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ESSAY ON THE
CANADIAN CONSTITUTION

Essay prepared for the
Royal Commission on Bilingualism
and Biculturalism

Gerald Le Dain

July, 1966

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E R R A T A

CHAPTER I.

p.10, line 6, -- delete word "a" before word "full".

CHAPTER II.

p.23, line 25, -- capitalize "provinces".

p.36, line 19, -- replace word "to" before "the constitution" with word "of".

p.50, line 17, -- replace word "involve" with word "invoke".

CHAPTER III.

p.61, line 24, -- add after "toleration;" footnote "7".

CHAPTER IV.

p.76, line 22, -- delete letter "e" on word "Lambe".

p.77, line 12, -- delete letter "s" on word "instructions".

p.77, line 14, -- change footnote "12" to read "17".

p.78, line 7 of text, -- replace word "impersonal" with word "impartial".

p.81, line 3 of quote, -- delete the comma after "purpose".

p.81, line 23 of text, -- replace word "whether" with word "where".

p.84, line 1, -- add after "eduation." footnote "33".

p.84, line 14, -- add after "damages." footnote "34".

CHAPTER V.

p.99, line 22, -- replace word "votes" with word "voted".

p.99, line 27, -- add after word "provision" a comma.

p.100, line 20 of text, -- add after word "federal" a comma.

ERRATA (CONT'D.)

CHAPTER VI.

p.113, line 16, -- replace word "distance" with word "distinct".

p.120, line 1, -- delete letter "s" on word "fields".

NOTES

Note 30 to Chapter IV, line 3, -- replace word "charge" with word "church".

Note 18 to Chapter V, -- replace number "1" with number "7".

Note 5 to Chapter VIII, line 1, -- delete letter "s" on word "injunctions".

Note 10 to Chapter IX, line 11, -- replace word "has" with word "have".

1. The Commission's Terms of Reference and Its Preliminary Report.

This paper has been written in response to a request from the Director of Research for an "essay" on the Canadian constitution in relation to the problem of bilingualism and biculturalism.

It has obviously been necessary to make certain assumptions concerning the nature of this problem, and indeed, to anticipate to some extent the conclusions of the Commission itself. We must agree on the general nature of the problem before we can usefully consider its constitutional implications.

The Commission's terms of reference and its Preliminary Report give us some idea as to what is considered to be the ideal relationship between the French-speaking and English-speaking communities in Canada and as to what the Commission has discovered concerning the nature of French Canada's dissatisfaction with its present position in Confederation.

The Commission's terms of reference commit it to a consideration of how best to promote the achievement of a constitutional and political goal, which is described as the development of "the Canadian Confederation on the basis of an equal partnership between the two founding races, taking into account the contribution made by the other ethnic groups to the cultural enrichment of Canada and the measures that should be taken to safeguard that contribution". The Commission has emphasized that the master idea in its terms of reference and the key to the nature of its task is

the principle of "an equal partnership between the two founding races".¹ It points out, however, that its terms of reference also postulate "the existence of a Canada united by a common political regime".²

Thus a constitutional study related to the work of the Commission must consider the constitutional arrangements which are best adapted to the achievement of the overall objective of a united Canada based on an equal partnership of the two founding races. What is the point of departure for such a study? It would seem to be what has given rise to the present constitutional crisis in Canada, that is, the profound dissatisfaction of French Canada with its position in Confederation. The Commission has expressed the view that this is the natural approach to its inquiry:³

It must be recognized at the outset that the Commission was appointed, at least to some extent, for the purpose of studying the grievances, which French-Canadians, and particularly those in the Province of Quebec, have been expressing more and more vigorously. It is French Canada which, through its spokesmen, has been expressing dissatisfaction with the present state of affairs and insisting that it is the victim of inequalities which it finds unacceptable. For that reason we were led to study first those areas where grievances are already numerous and where the status quo is under examination. Any other approach would be unrealistic.

What, in a general way, does the Commission's Preliminary Report disclose about the nature of the French-Canadian grievance? The following passage is strongly suggestive of the essential cause of the dissatisfaction:⁴

According to many French-speaking people who spoke to us, the principal institutions in the country are

frustrating their desire to live their lives fully as French Canadians. This situation, they said, prevails even in Quebec itself inside the economic institutions of the province: such and such a plant in the locality, managed by English-speaking people, was carrying on its business as though it were in "colonial territory", and was preventing the majority of its employees from working in their mother tongue once they reached a certain level. The English-speaking managerial group -- often a tiny proportion of the population -- felt no need to speak French and, as a result, rarely bothered to learn it. These people freely admitted that this sort of situation was not new and that, on the contrary, it has always existed in Quebec. But they added that they could no longer allow it to continue.

2. The Constitutional Implications of French-Canadian Aspirations.

French-Canadian dissatisfaction with the present state of Confederation is broadly of two kinds, both closely related to each other: a) French-Canadian language and culture do not have equal status, with the result that the French-Canadians do not feel that they have equal opportunity; and b) French-Canadians do not have the share of economic benefits and influence to which they feel they are entitled. One is the problem of cultural isolation and inferiority; the other, the related problem of social and economic inferiority. The French-Canadian seeks to play a more vigorous and influential role in the life of the country at all levels of activity and achievement: government, business, and the professions. He seeks the power, prestige, and material rewards of success in these fields. The present discontent in Quebec is chiefly that of a frustrated middle class who feel that they do not compete on equal terms with their English-speaking counterparts.

It is a mistake, however, to view the present bicultural

crisis solely in terms of French-Canadian grievances; the positive side is an energetic desire by French-Canadians to solve their problems by instruments of their own creation. This is the essential drive behind the demand for constitutional change. The French-Canadian nation seeks the political and economic powers which it considers necessary to permit it to make a great leap forward in enhanced personal dignity, improved living standards and richer opportunities for personal development. There is, of course, a strong element of isolation in the reaction of many to the baffling and discouraging problem of how a French-speaking minority can survive culturally on the North American continent, but the dominant force in French Canada today is a vigorous activism that is flexible and out-reaching in its efforts to bring the community forward in terms of the highest standards established in the Western world. The emerging purpose is to use political power to effect a rapid revolution in the social and economic condition of the French-Canadian people.

Indeed, the present constitutional tension arises principally from the conviction of French-Canadian leadership that provincial governmental power is the chief instrument of French Canada's emancipation. The state is seen by French-Canadians as the only power available to them by which they can hope to achieve a measure of control over their social and economic destiny. It is the only force which they can set up against the concentration of economic power in the hands of English-speaking Canadians. They, therefore, seek an increasing measure of recognition for their state

and all the powers -- legislative, administrative, and financial -- which are necessary to enable it to pursue the objectives of French-Canadian emancipation.

Obviously, the solutions to the present dissatisfaction felt by French-Canadians are by no means all of a legal or constitutional nature. They lie in many cases in a change of attitude and practice by Canadians in all walks of life. The problem of cultural prejudice cannot be overcome by legislation, nor can people be coerced by law to understand and sympathize with another language and culture. The problem is also one of French-Canadian motivation: a willingness to adapt to the requirements of modern business activity in terms of training, commitment, and mobility.

If we are to believe what we are told on every side, the French-Canadian feels an alien in his own country. He feels that he has been relegated to an inferior status because of his language and culture. His self-esteem is constantly challenged. He is no longer prepared, however, to wait for the slow dissipation of cultural prejudice and the even slower spread of bilingualism. He has lived too long with a sense of alienation, inferiority, and frustration to wait upon the evolution of attitudes. He seeks a solution which he can fashion with his own hands.

Constitutionally, the choice is between creating a Quebec in which the French-Canadians may have, not merely an equal opportunity for advancement in business, but in time an advantage over English-speaking inhabitants in the province, and creating the conditions of cultural equality in Canada which will enable the French-

Canadians to live and work anywhere in the country without a sense of being handicapped.

The constitutional objectives of the present political leadership of French Canada, which seeks a solution to the bicultural problem in political association and co-operation with the rest of Canada, may be summarized as follows: a) recognition of the French-Canadian "nation" as an equal partner in Confederation; b) recognition of the Quebec "state" as the special instrument for safeguarding and promoting the interests of the French-Canadian "nation" within Confederation; and c) recognition of the powers which the Quebec "state" requires for this purpose.

These objectives must be reconciled with the federal purpose and the responsibilities and constitutional requirements of the federal government. There is reason to believe that the Honourable Mr. René Lévesque, then Quebec Minister of Natural Resources, expressed in an interview which he gave to Le Devoir on July 5, 1963,⁵ an approach to this issue which commands, and will continue to command, the support of a majority of the population in the province of Quebec:

... if Canada wants to be healthy, then, within it, the legislative, fiscal, and administrative powers of the nation-State that is Quebec, and its role, must become as broad and autonomous as the federal system can stand. This is an absolute priority; it is the federal priorities that must be residual.

In this same interview, we find emphasis on the three essential concepts underlying the thinking of responsible political leadership in Quebec: the idea of a French-Canadian nation, the

idea of a Quebec state, and the idea that Quebec has special requirements because of its special responsibilities. These ideas are accepted as the fundamental assumptions of this study because they are believed to be viable ideas which will continue to command support and exercise influence in the political life of the province and the country for as long as one can foresee.

Before considering the detailed implications of these three assumptions, it is appropriate to turn to a consideration of the federal purpose and the essential constitutional requirements of the federal government.

3. The Federal Purpose and the Essential Constitutional Requirements of the Federal Government.

One of the chief difficulties in connection with the question of constitutional revision today is that there has not as yet been any serious public attempt to define the federal purpose in terms which might indicate the essential constitutional requirements of the federal government.

It is clear that the role of the federal government has undergone a profound change of emphasis in recent years. This is owing to Canada's changing political and economic relations in the world community. Since the Second World War, Canada has become integrated into the North American economy to a degree that permits little further choice in terms of world trading patterns and domestic business relationships. This was the result of the post-war national policy to stimulate the economic development of the

country as rapidly as possible with the only available instrument at hand -- American capital. It was a policy that was achieved by administrative encouragement rather than the exercise of legislative power. Ottawa acted as a commercial clearing house for American investors and a large sales agency for the promotion of Canada as a place to establish business. In the fields of foreign policy and defence, Canada has been gradually forced to assume a relatively less important role than that of the "honest broker" between Great Britain and the United States. This has been due to the decline of Great Britain's power and influence in world affairs and its own relative dependence on American leadership.

There is no doubt that foreign policy and defence -- the issues of peace and war -- must remain matters of the gravest concern to Canadians and the chief responsibility of their federal government, but they are not functions which, in the present context of world power relations, can give the people of Canada an inspired sense of purpose. The fate of Canada will inevitably be decided by American policy. This was clearly demonstrated, if further demonstration was required, by the defence controversy which played an important part in the defeat of the Diefenbaker government in 1963. Canada can no doubt still create difficulties for the great powers from time to time, but she cannot profoundly influence the course of world affairs, and indeed, has no alternative but to support the broad lines of American policy. Unlike France, which aspires to leadership of a large and relatively self-sufficient economic community with opportunities for close political and

cultural co-operation, Canada is now an inseparable part of North American civilization and has no world options of its own.

There remains, however, an important national purpose to be furthered by the federal government and that is the maintenance and development of Canada's relative position in the world economy by the promotion of world trade and the attraction of foreign capital. The most useful function that the federal government can perform today is to act as a co-ordinated selling agency for Canadian products. World trade today requires the effort of national agencies with the resources, personnel and international contacts required to compete for large markets, which tend to move in blocks. This is owing to the requirements for credit and financing which make it necessary for nations to consolidate their debts and deal with one or two major customers or bankers. The pattern of world trade today is increasingly one of governments going out to obtain blocks of business for re-distribution in their own countries by competitive bid. It might be that this function could be performed by the Canadian provinces acting together and establishing common agencies for the promotion of their foreign trade, but it is unlikely that such a system, requiring continuous and smooth working agreement and co-operation, would be as satisfactory and effective in the long run as the federal government acting alone.

A significant measure of the adequacy of governmental power today is the extent to which it permits effective economic planning. The First Annual Review of the Economic Council of

Canada⁶ formulated a national economic purpose for the period 1965-1970 in terms which provide a convenient frame of reference for consideration of the legislative and administrative powers required by the two co-ordinate levels of government and of the necessity of a high degree of inter-governmental co-operation and co-ordination. The goals are, in the words of the Deutsch Report: a full employment, a high rate of economic growth, reasonable stability of prices, a viable balance of payments, and an equitable distribution of rising incomes. The overall objective is to attain these ends, which are not always compatible, in the fullest possible measure. The Deutsch Report has emphasized that success in this great national purpose will require co-operation and co-ordinated planning by government, business, and labour, but it underlines the necessity of a greater initiative by government.

The Deutsch Report is a peremptory economic answer to political theories of separatism. It emphasizes the complexity and inter-dependence of the national and continental economies and the very intimate relationship between Canadian economic welfare and world economic and commercial conditions. It demonstrates that the Canadian future lies not in isolationism and unco-ordinated initiative, but in an increasing measure of co-operation and co-ordination between all the interests and institutions having power to influence the course of economic events. The general conclusion to be drawn from the Report is that economic planning is the most urgent task of government in Canada today.

When we examine the question of legislative power in the

light of these general economic objectives, we are faced with the necessity of a co-ordinated national effort whether that is achieved by federal governmental power or by co-operation between the two co-ordinate levels of government or by a combination of both. In effect, the Deutsch Report is one of the most compelling contemporary statements of the relative importance of the role of the federal government. At the same time, it is highly suggestive of the important functions to be performed by regional and local government. It is a realistic, practical framework in which to consider the question of constitutional revision and the ideal character of political and constitutional relationships in Canada. The conclusion is inescapable: the future lies with co-operative federalism.

It is clear, moreover, that the present impulse and direction in Quebec government policy is that which must be pursued with increasing vigour by the country as a whole. It is the most vigorous exercise of governmental initiative in the fields of regional economic planning, education and technical training, the stimulation of industrial development, the raising of standards of social welfare, and a more just distribution of income. But the economic goals laid down by the Deutsch Report cannot be achieved by the unco-ordinated efforts of regional governments alone. Indeed, Quebec cannot achieve its own goals without a co-ordinated national effort.

If Canadians are to achieve the economic objectives defined by the Deutsch Report, primary governmental responsibility for the specific tasks implied by these objectives would appear to fall naturally into the following broad divisions:

- (a) Monetary policy, by which we must reconcile in the fullest possible measure of compatibility the requirements of an adequate money supply for a rapid rate of economic growth and a reasonable stability of prices to maintain the relative standard of living at home and the competitive position abroad, must remain the responsibility of the federal government;
- (b) The necessity of increased emphasis on education, and in particular on the technical training required for a high degree of mobility and adaptability to technological change, must remain the primary responsibility of the provincial governments;
- (c) Fiscal policy and the related subject of government spending should continue to be shared according to an agreed order of priorities determined by the closest co-operation and co-ordination of government policies;
- (d) Because of the urgency and overriding importance of the fundamental goals of the Quebec "revolution", the first priority in the field of social welfare and redistribution of income must be provincial, subject to inter-governmental agreement as to what is just and reasonable in terms of inter-regional distribution and the maintenance of minimum standards of national welfare;
- (e) Primary responsibility for a co-ordinated national effort to promote Canada's international trade by the

negotiation of tariff and exchange agreements and the aggressive development of markets must necessarily rest with the federal government, but the closest possible consultation and co-operation should be maintained with the provincial governments and all reasonable scope given to the latter for their own efforts to attract capital and develop markets for their products.

4. The Recognition of the French-Canadian Nation as an Equal Partner in Confederation.

As already indicated, this is the basic assumption or working premise of the Commission's inquiry. It is not easy to determine the precise content and current reality of the present concept of "the French-Canadian nation", and no doubt there will be other studies more precisely directed to this question, but it is necessary here to consider what is essentially implied in the concept in order to be able to express an opinion on the constitutional implications of the goal which has been assumed in the Commission's terms of reference.

Mr. Pierre-Elliott Trudeau has spoken, with reference to "the French-Canadian nation", as follows:⁷

The nation is, in fact, the guardian of certain very positive qualities: a cultural heritage, common traditions, a community awareness, historical continuity, a set of mores, all of which -- at this juncture in history -- go to make a man what he is. Certainly these qualities are more private than public, more introverted than extroverted, more instinctive and primitive than

intelligent and civilized, more self-centred and impulsive than generous and reasonable. They belong to a transitional period in world history. But they are a reality of our time, probably useful, and in any event considered indispensable by all national communities.

There are several practical issues suggested by this notion of the recognition of the French-Canadian nation as an equal partner in Confederation. What is basically involved is recognition of and respect for French-Canadian culture, but since language is the vehicle of culture, the first and immediate objective is recognition of the equal status of the French language in Canada and practical implementation of this recognition in daily life. If Canada was in fact a truly bilingual country the question of formal or constitutional recognition would be relatively unimportant. At the present time there is neither an effective working bilingualism nor a national commitment to achieve a specified degree of bilingualism. There is, therefore, a serious question in French-Canadian minds as to Canadian intentions concerning this issue. The French-Canadian sees the practical difficulties of achieving bilingualism in the country as a whole, and this only reinforces his skepticism about the possibility of realizing his aspirations in political association with the rest of Canada. The first issue, then, is the constitutional guarantee to be given to the use of the French language in Canada.

A second, but closely related issue, is the right of French-Canadians to be educated anywhere in Canada in their own language. This is the right, outside Quebec, to have French language schools without the burden of double taxation. This

issue is central to the future of French-Canadians in business and industry. Advancement in business today calls for readiness to be moved about the country in order to acquire the necessary experience and breadth of view for higher levels of managerial responsibility. One of the chief objections which ambitious young French-Canadians have to such transfers is that they are not able to find suitable education for their children outside Quebec.

True cultural equality for French-speaking Canadians also depends on the existence throughout the country of French-language media of communication: press and periodicals, radio and television. If French-Canadians are to feel at home in their own country they must have adequate cultural support from the media of communication.

Another aspect of the recognition of the French-Canadian nation as an equal partner in Confederation is the right to employment without discrimination on the basis of language or cultural prejudice. The situation in the federal government is obviously a special case. Here, it would seem, the French-Canadian may insist on representation at least equal to his proportion of the population, as a whole, if not an equal representation with the English-speaking community. It is obvious that the constitution may impose obligations on public agencies more easily than it can on private employers. The federal and provincial governments and their respective agencies are thus the chief instruments for promoting an effective bilingualism and biculturalism in Canada. French-Canadian realization of this is one of the reasons for the importance which is attached to state action as the means of French-Canadian emancipation.

One of the constitutional issues in this area is how far the recommendations of this Royal Commission may be, and should be, embodied in constitutional guarantees. Should, for example, an adequate knowledge of both official languages be made a condition of employment in all government agencies?

A further aspect of the recognition of the French-Canadian nation is recognition of the cultural solidarity which French-Canadians seek to achieve with the French-speaking world as a means of preserving and enriching their culture. One of the great handicaps which French-Canadians have encountered in business and technology is that their language lacked a business and technical vocabulary of sufficient precision and range to make it serviceable in daily intercourse. This is one of the reasons that they have welcomed commercial and technical exchanges with France. They seek to enrich their language and adapt it to modern needs so that they may use it in every field of activity. They have an obvious interest in the expansion of French culture everywhere. In Latin America, for example, they have closer affinity with the inhabitants than do Anglo-Saxons, by reason of temperament, language and religion. They seek to exploit advantages of this kind. For this reason, they seek the capacity to engage freely in international relations of a cultural and economic character. This raises the problem of Quebec's international status, an aspect of the next issue, which we have referred to as the "recognition of the Quebec State".

The essence of the recognition of the French-Canadian nation as an equal partner in Confederation would appear to be the

creation of conditions which will enable the French-Canadian to feel "at home" everywhere in Canada and to live and work on a basis of equal opportunity with English-speaking Canadians.

5. Recognition of the Quebec "State".

The issue here is recognition of the importance of the Quebec government as the chief instrument of French Canada's emancipation and development. It necessarily means recognition that the Quebec government has a special political role and importance that distinguishes it from the other provincial governments. It is summed up in the expression "Québec n'est pas une province comme des autres."

It is clear from the activity of the Quebec government in recent years that it is engaged in a massive effort to improve the social and economic condition of French Canada. This governmental activity is the political expression of the "quiet revolution". The Quebec government is attempting to modernize and improve the educational system to equip French-Canadians to play a more significant role in modern life, to raise standards of welfare, and to create employment opportunities for a better educated youth. It would be futile and even dangerous to train the population for a more important role in life and fail to create employment opportunities for them.

Quebec cannot rely on the initiative of private enterprise alone to assure that adequate employment possibilities will be open to the new generation of better-trained French-Canadians. Needless

to say, the government seeks to stimulate the development of private enterprise in the province by creating conditions which will encourage industry to establish there, but it also seeks by various forms of direction and influence to promote economic development on a regional basis, to de-centralize and redistribute economic power, to create employment opportunities by public enterprise, and to secure for French-Canadians equal opportunity for employment and advancement in the private sector of the economy.

6. The Necessary Powers of the Quebec "State".

What does the Quebec government need in the way of powers and financial resources to fulfil this role? This, broadly speaking, is the constitutional issue.

Speaking in his budget speech of April 5, 1963,⁸ of the "vast project of national renewal" being undertaken by the province of Quebec and the priority which this project gives to provincial fiscal requirements, Premier Jean Lesage said:

... There is no longer a state of war, and the economic problems which confronted Canada after 1950 are not those of today. It is the needs of the provinces which, after all these years, have to take precedence over those of the federal government ...

We know that Quebec's needs are essential ones. We have already insisted upon this point. In brief, we have to improve our level of education, since the goal of national self-assertion for which we are now striving would otherwise be ephemeral. We have to raise the level of public health and social welfare in our province, so that our citizens may play a more efficient part as producers in our economy and so that

they may become happier human beings. Finally, it is necessary that the province be henceforth in a position to carry out its responsibilities in the economic sphere.

... Under the Canadian Constitution, the important elements of economic growth and the development of the wealth of the soil, which are but one aspect of the question, fall within the jurisdiction of the provinces. The latter actually control the greater number of factors through which a true development policy can come and can have a chance of success. The provinces are also in a position to influence the rate of their own industrial progress by their actions in the location of secondary industries, by laying out roads and communications to facilitate access to basic resources, and by their absolute jurisdiction over municipal structures. Furthermore, they can participate directly in investments for the development of resources and the establishing of industries in places where economic conditions make it desirable. In other words, the provinces are better placed than the central government to initiate a policy of economic development, because they are closer to the particular problems of their people and the regions that make up their territory.

In the interview with Le Devoir of July 5, 1963,⁹ referred to above, Mr. René Lévesque said, concerning the role and necessary powers of the "state" of Quebec:

Our great weakness (individual and collective), and the source of nearly all the others, is economic. That, in my opinion, is the No. 1 problem.

... Education's priority is already widely recognized; but the associated and equally urgent need for economic development and control is far less widely understood.

This problem must be solved by all the legitimate means at our disposal. In our case, more so than for many other nations, the State, i.e., the State of Quebec, constitutes the first and foremost of these means. Various essential tasks devolve upon it: taking stock of our resources and our needs, guiding and planning our over-all economic development, regional planning, developing our national resources for the benefit of the nation, recovering our rights in the field of taxation -- and so on and on.

It is especially necessary for us to use the economic power of the State as we are one of Canada's 'have-not' minorities. The private sector of our economy is too weak to provide us with the 'rocket launchers' that can blast us off the ramp of our debilitating poverty. Our principal 'capitalist' for the moment -- and for as far into the future as we can see -- must therefore be the State. It must be more than a participant in the economic development and emancipation of Quebec; it must be a creative agent.

... As I see it, there are three foremost pressing needs: (a) the control of power resources, which are the moving force behind development in general -- and this is well on the way to achievement; (b) the creation of an iron and steel industry, which is a spring-board for secondary industry as well as a blast-off pad for launching ourselves into economic orbit; and (c) the mustering and channelling of our Quebec capital funds, by Quebec, for Quebec use. That is the purpose of the General Investment Corporation, but it cannot of course be expected to do the job alone.

7. The Necessary Reconciliation of Provincial and Federal Needs.

There are various ways in which the essential problem of the distribution of effective governmental power in Canada may be expressed, but the following resolution adopted by the House of Commons on January 28, 1935,¹⁰ has the merit both of showing that the problem is by no means of recent origin or conception and of expressing it in terms which are still relevant more than thirty years later:

That in the opinion of this House, a special committee should be set up to study and report on the best method by which the British North America Act may be amended, so that while safeguarding the existing rights of racial and religious minorities, and legitimate claims to autonomy, the Dominion Government may be given adequate power to deal

effectively with urgent economic problems which are essentially national in scope.

CHAPTER II. THE ESSENTIAL CHARACTERISTICS OF THE CANADIAN CONSTITUTION IN THE PERSPECTIVE OF CURRENT CONSTITUTIONAL ISSUES

In essence the Canadian Constitution is a combination of the federal, parliamentary and monarchical principles, as indicated in the Preamble to the British North America Act, 1867:

Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom: ...

These three fundamental characteristics of the Canadian polity and constitution must all be re-examined in the context of the present constitutional crisis.

1. Was There a Confederation 'Compact', and If So, What Was It?

There has been much difference of opinion, and indeed controversy, as to the essential basis of the union in 1867 of the provinces of Canada, Nova Scotia, and New Brunswick. The union was effected, at the request of the colonies themselves, by a statute of the Imperial Parliament, which became the written constitution of the Dominion. In strict law, Confederation was an act of the government of the United Kingdom rather than an act of the colonies themselves, as in the case of the American Revolution. In fact, the British North America Act was the formal result of several years of conference and debate in the colonies and was closely modelled upon resolutions drawn up by Canadian statesmen to record their agreement concerning the basis of union.

These conferences and debates served the function of a constituent assembly, and they reflect the essential historical fact that Confederation was based on an agreement between the interested colonies.

The contemporary historical documents, consisting mainly of the debates on the Quebec resolutions in the Parliament of the Province of Canada, show that there were divergent views as to the form which the union should take. There were some, like Sir John A. MacDonald and Alexander Galt, who favoured a legislative union, or as much centralization as possible; others, mainly from Lower Canada, favoured a high degree of de-centralization or provincial autonomy.¹ The constitution which emerged was a compromise embodying the mutual concessions that were necessary to obtain the agreement of the various parties to the union.

This is the historical basis of the "compact" or "treaty"² view of the Canadian Constitution. Advocates of this view contend that the spirit which should animate the interpretation and application of the constitution is this notion of a solemn compact on the faith of which the colonies entered into Confederation. Critics of this view -- and they are many -- contend that the British North America Act represents a new political and legal departure, and is not merely evidence of a prior political agreement. Whatever the historical evidence may suggest, the courts themselves have given a certain air of authority to the "compact" theory. In A-G Australia v. Colonial Sugar Refining Co.,³ Lord Haldane referred to the British North America Act as "a treaty of union among the then provinces", and the following passage of the judgment of the Privy Council, delivered by Lord Sankey,

in the Aeronautics case,⁴ is perhaps the most explicit formulation of the compact theory to be found in the judicial decisions:

Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss.91 and 92 should impose a new and different contract upon the federating bodies.

The issue today is not so much whether the compact theory is historically tenable, since it appears to be one of the current political realities, but precisely what it is that the compact is supposed to have guaranteed to the various parties. It must not be forgotten that the special position of French Canada was only one of the concerns in the minds of Canadian political leaders at the time of Confederation. There were other important regional, minority and class preoccupations concerning the nature and effects of the proposed union. The English-speaking Canadians were certainly as preoccupied with the economic implications of the union as with any cultural or racial considerations. The commercial community desired assurances of a national commerce with which provincial governments could not seriously interfere. They sought the advantage of a uniform legislative treatment of important commercial and economic matters. If there was insistence by French Canada upon the protection of its language and upon as much provincial autonomy as possible in respect of other matters intimately related to its culture, there was equal insistence by the English-speaking

commercial community upon a central government with sufficient powers and financial resources to assure the development of a national economy, including the creation of the necessary transportation facilities which were an essential condition of the entry of certain of the colonies into Confederation.

There would appear to be nothing in the historical evidence, or in the terms of the B.N.A. Act itself, to suggest that Confederation was regarded as a compact between the two founding races, much less an equal partnership between them. There is no doubt, however, that important concessions were made to French Canada in order to win its agreement to enter the proposed union, and certainly French Canada's concern for its cultural survival made it the chief protagonist of provincial power in the pre-Confederation conferences and debates. Thus it may not be untrue to say that the essential compromise concerning the distribution of legislative power under the new constitution was the result of a consensus between the English-speaking and French-speaking communities.

What was the essence of that compromise? In the words of the Tremblay Commission,⁵ "What sort of system had been promised Lower Canada to make it decide to take part in the new Confederation?" The answer given by the Tremblay Commission is "that the Union would be federative and, secondly, that within this federative union Lower Canada would enjoy all the autonomy needed to preserve its own national life."

In the speech of Lord Carnarvon,⁶ introducing the British North America Act in the House of Lords, there is emphasis not on the

special position and expectations of Lower Canada, but on the broad principles underlying the distribution of legislative power between the central and provincial governments. He said:

I now pass to that which is perhaps the most delicate and the most important part of this measure -- the distribution of powers between the Central Parliament and the local authorities. In this is, I think, comprised the main theory and constitution of Federal Government: on this depends the practical working of the new system; and here we navigate a sea of difficulties -- there are rocks on the right hand and on the left. If, on the one hand, the Central Government is too strong, then there is risk that it may absorb the local action and that wholesome self-government by the Provincial bodies, which it is a matter of both good faith and practical expediency to maintain; if, on the other hand, the Central Government is not strong enough, there arises a conflict of State rights and pretensions, cohesion is destroyed and the effective rigour of the central authorities is encroached upon. The real object which we have in view is to give to the Central Government those high functions and almost sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the provinces; and, at the same time, to retain for each Province so ample a measure of municipal liberty and self-government as will allow, and indeed compel, them to exercise those local powers which they can exercise with great advantage to the community

In closing my observations upon the distribution of powers I ought to point out that, just as the authority of the Central Parliament will prevail whenever it may come into conflict with the Local Legislatures, so the residue of legislation, if any, unprovided for in the specific classification which I have explained will belong to the Central body. It will be seen under the 91st clause that the classification is not intended 'to restrict the generality' of the powers previously given to the Central Parliament, and that those powers extend to all laws made 'for the peace, order and good government' of the Confederation -- terms which, according to all precedents, will, I understand, carry with them an ample measure of legislative authority.

The importance which the Privy Council attached to this statement of legislative intention is reflected in the following passage from the judgment of Lord Sankey in the Aeronautics case:⁷

But while the Courts should be jealous in upholding the charter of the Provinces as enacted in s.92 it must no less be borne in mind that the real object of the Act was to give the central Government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the Provinces as members of a constituent whole.

Such historical evidence as there is suggests that English-speaking Canadians, particularly the minority in Lower Canada, saw the protection of their essential interests in a strong central government, but it is not so clear that French-Canadians generally foresaw the importance which provincial autonomy would one day assume. The conservatives, who were the political leaders of the day believed that French Canada's interests would be sufficiently protected by representation in the federal Parliament, and they concentrated on the composition of the Senate, which, by giving fixed regional representation, was intended to protect Quebec against the dangers of representation by population. Their political opposition in Lower Canada sensed the dangers of an over-dominant federal government and criticized the proposed arrangements on the ground that they would make the provinces little more than municipal governments. For their part, the English-speaking minority in Lower Canada, or "Canada East" as it was called, sought assurance that they would not be left to the political mercy of the French-Canadian majority in the new province of Quebec.⁸

The basic concepts underlying the present constitutional controversy were already in the political atmosphere more than 100 years ago. The idea of the French-Canadian nation, the notion of the provinces as autonomous states, and even the desire of Quebec to be "maître chez lui" are all to be found in newspaper articles of the day.⁹ Thus, it

may be assumed that the fears of French-Canadians concerning their future in the proposed confederation were fully aired in the newspapers and in public debate, and the assurances of politicians that they had nothing to fear may be reasonably considered to have constituted the assumption upon which they agreed to enter the union.

The political opposition in Lower Canada would have preferred a system based on the American one, in which the residue of power was left with the states. Indeed, critics of the plan for Canada contended that it was a misnomer to call it "federal". The courts have observed that the term "federal" is more properly applicable to the Australian and American constitutions than it is to the Canadian. In Attorney-General for the Commonwealth of Australia v. The Colonial Sugar Refining Co.,¹⁰ Viscount Haldane said with reference to the Australian constitution:

About the fundamental principle of that Constitution there can be no doubt. It is federal in the strict sense of the term, as a reference to what was established on a different footing in Canada shews. The British North America Act of 1867 commences with the preamble that the then Provinces had expressed their desire to be federally united into the Dominion with a Constitution similar in principle to that of the United Kingdom. In a loose sense the word "federal" may be used, as it is there used, to describe any arrangement under which self-contained States agree to delegate their powers to a common Government with a view to entirely new Constitutions even of the States themselves. But the natural and literal interpretation of the word confines its application to cases in which these States, while agreeing on a measure of delegation, yet in the main continue to preserve their original Constitutions. Now, as regards Canada, the second of the resolutions, passed at Québec in October, 1864, on which the British North America Act was founded, shews that what was in the minds of those who agreed on the resolutions was a general Government charged with matters of common interest, and new and merely local Governments for the Provinces. The Provinces were to have fresh and much restricted Constitutions, their Governments being entirely remodelled. This plan was

carried out by the Imperial statute of 1867. By the 91st section a general power was given to the new Parliament of Canada to make laws for the peace, order, and good government of Canada without restriction to specific subjects, and excepting only the subjects specifically and exclusively assigned to the Provincial Legislatures by s.92. There followed an enumeration of subjects which were to be dealt with by the Dominion Parliament, but this enumeration was not to restrict the generality of the power conferred on it. The Act, therefore, departs widely from the true federal model adopted in the Constitution of the United States, the tenth amendment to which declares that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to their people. Of the Canadian Constitution the true view appears, therefore, to be that, although it was founded on the Quebec Resolutions and so must be accepted as a treaty of union among the then Provinces, yet when once enacted by the Imperial Parliament it constituted a fresh departure, and established new Dominion and Provincial Governments with defined powers and duties both derived from the Act of the Imperial Parliament which was their legal source.

In fashioning the Constitution of the Commonwealth of Australia the principle established by the United States was adopted in preference to that chosen by Canada.

This view, that the Canadian constitution is not, strictly speaking, a federal one in the same way as those of the United States and Australia, has been repeated in subsequent decisions of the Privy Council and Supreme Court of Canada.¹¹ Apart from the obvious fact that the residue of power lies with the central government rather than the regional governments, as in the case of the American and Australian constitutions, it is difficult to define the practical implications of the difference. Perhaps the most important one is the notion that the British North America Act is an entirely new departure, from which all powers, federal and provincial, are derived. The central government is not the creature of the provinces nor are the latter's powers to be determined by reference to what they were before Confederation. The

provinces are new political and constitutional entities. This raises the question as to whether the British North America Act distributed full power of self-government between the two co-ordinate levels of government. The courts have generally affirmed that it did,¹² although prior to the Statute of Westminster there were a few important qualifications of Canadian legislative sovereignty. Today, the chief remaining one is the lack of power to amend the Constitution.

2. Federal Control over the Provinces.

The importance which was attached at the time of Confederation to the federal government as the ultimate safeguard against abuses of provincial legislative power, and as the assurance that certain important public offices would be placed above the vagaries and pressures of local politics, is reflected in several provisions of the British North America Act, which detract, in theory at least, from the dignity and independence of the provincial governments.

These provisions are: the federal power to disallow provincial legislation;¹³ the right of appeal to the federal government and the latter's power of remedial legislation in respect of provincial statutes or administrative acts affecting the educational rights or privileges of religious minorities in the provinces;¹⁴ and the federal power of appointment of the Lieutenant-Governor¹⁵ and the judges of the superior, district and county courts in the provinces.¹⁶

These federal powers are of varying practical importance today. Certain of them will be the subject of further comment in this study, but it is sufficient to observe at this point that they represent an

important qualification of the federal character of the Canadian constitution¹⁷ and raise, in the present climate of constitutional controversy, a general question as to whether federal political control is any longer appropriate or acceptable as an ultimate safeguard of fundamental rights and interests under the constitution.

3. The Principle of Parliamentary Sovereignty and the Question of Whether There Should Be a Bill of Rights.

There are two aspects of the parliamentary system which invite comment in connection with the possibility of constitutional revision.

The first is the essential difference between the parliamentary and the presidential systems. Under the Canadian constitution, there is no separation, as there is in the United States, between the executive and the legislative branches of government. In Canada, as in England, the executive is subject to the control of the legislature, and the government must be formed from persons who become members of Parliament. In the United States, the President, in whom the whole of the executive power and responsibility is vested by the Constitution, is free to choose his "cabinet" from non-political and non-elected persons, thus giving him a much wider range of experience and competence upon which to draw for advisors and administrative leaders. This advantage of the presidential system has become increasingly impressive in recent years, but it is assumed, for purposes of this study, that there is no serious body of opinion in this country which is likely to advocate the adoption of the presidential system, and that even if there were, it would have no chance of success because of the implications of such a change for the monarchical character of our constitution.

A second aspect of the Canadian parliamentary system is that the Parliament of Canada and the provincial legislatures, within their respective legislative jurisdictions under the British North America Act, are as sovereign as the Parliament of the United Kingdom. There is in Canada no entrenched bill of rights, no test of the validity of legislation other than the distribution of legislative jurisdiction under the constitution. The federal 'bill of rights' is merely an interpretation statute which, as applied by the courts to day, has had little or no practical significance. The courts appear to be reluctant to recognize in it a qualification of the principle of parliamentary sovereignty. Moreover, it applies only to federal legislation. The issue, therefore, arises as to whether a true bill of rights should be introduced into the Canadian constitution. This matter will be examined in some detail later. It may be observed here, however, that an entrenched bill of rights changes the fundamental nature of a constitution, and in particular, greatly increases the importance and power of the courts as moulders of constitutional policy and instruments of constitutional change. It is, therefore, not an innovation to be lightly introduced, particularly if a combination of legislative self-restraint and judicial interpretation, unaided by a bill of rights, has on the whole offered satisfactory safeguards for fundamental rights and freedoms.

4. The Cultural Guarantees of the Canadian Constitution and the Extent to Which the 'Equal Partnership' Concept Is Reflected in the Present Constitution.

The principal qualifications of parliamentary sovereignty in the Canadian constitution, apart from the limitations resulting from the distribution of legislative jurisdiction, are those contained in the

provisions dealing with language and education, which, together with certain provisions recognizing the special character of Quebec law, constitute what may be called the cultural guarantees of the constitution.

The constitutional issue today is first and foremost the extent to which the recognition of the French language and culture is to be enlarged or extended so as to reflect more accurately the concept of an equal partnership of the two founding races.

It cannot be said that this notion is clearly reflected in the present constitution. The preamble makes no allusion to a compact or agreement between the two races as the basis of adherence to Confederation. The constitution does, however, recognize to a limited extent the special status of the language, religion and law of French Canada. In section 133¹⁸ of the B.N.A. Act there is recognition of the official character of both the French and English languages in Parliament and the federal courts and in the legislature and courts of the province of Quebec. Section 93¹⁹ safeguards the educational rights and privileges of Protestant and Roman Catholic minorities. The civil law of Quebec is excluded from the application of section 94,²⁰ which empowers Parliament to provide for the uniformity of laws relative to property and civil rights in the Provinces of Ontario, Nova Scotia, and New Brunswick. Finally, section 98 requires that the judges of the courts of Quebec be selected from the Bar of that province, which is a further recognition of the special character of the Quebec civil law.

The constitution is silent, however, on the subject of French-Canadian representation in Parliament and the federal courts,²¹ and of course there is no reference to such representation in the civil service

or public administration. These are matters which are left to political policy and decision. Nor does the constitution give the province of Quebec a weighted representation in the federal Parliament to reflect the partnership concept. Its representation in the House of Commons is based, like that of the other provinces, on its relative population. Its representation in the Senate, which is the same as that of Ontario, does not give it any special status as the home of the French-Canadian nation.

Thus, it cannot be said that the B.N.A. Act reflects the equal partnership idea. If such a notion has any historical or current validity, it must rest on a political consensus which is made operative by the number and relative importance of the appointments of French-Canadians to public offices. If we are to credit current grievances expressed in French Canada, there would appear to be dissatisfaction with the composition of the Supreme Court and with French-Canadian representation in the federal civil service. Not so much is said about representation in Parliament, presumably because the voting pattern in Quebec has generally been able to give the province the necessary political leverage to assure substantial influence over federal policy. The question that poses itself today is how far one should attempt to write the equal partnership concept into a revision of the constitution.

5. The Role of Judicial Review in Relation to the Question of Constitutional Amendment.

Judicial interpretation is the chief means by which a written constitution is maintained as an organic and flexible instrument adapted to changing political, social and economic conditions.

Under a constitution such as that of the United States, which guarantees fundamental rights, one of the chief functions of judicial review is to protect such rights from abuses of legislative power, and even in some cases, to force legislatures to adopt remedial measures to secure such rights.

Because the Canadian constitution does not contain a bill of rights, judicial review does not have the same scope in Canada as it does in the United States. Interpretation of the criminal law power has had the effect of establishing certain fundamental rights as beyond provincial legislative interference, but this has been an incidental result of the chief function of judicial review in this country, which is to determine the distribution of legislative power between the federal and provincial governments.

The history of judicial review of the British North America Act since Confederation nevertheless shows that within the limits imposed by the language of the constitution there is considerable scope for the flexible adjustment of conflicting interests.

The effective distribution of legislative power in Canada has turned on judicial interpretation of a few principal heads of jurisdiction in sections 91 and 92 of the B.N.A. Act. The scope of federal power has been very severely affected by the interpretation which the courts have given to the "peace, order and good government" and "trade and commerce" clauses in relation to provincial jurisdiction over property and civil rights. The emphasis on property and civil rights at the expense of these general heads of federal jurisdiction has shaped the Canadian constitution into one with a provincial bias.

Moreover, the judicial decisions, particularly with reference to the regulation of trade and commerce, reflect the acute difficulties which the courts often encounter in attempting to adapt a federal constitution to economic realities. They demonstrate that a federal system cannot operate effectively by the attribution of exclusive spheres of legislative jurisdiction alone, but requires working co-operation between the two co-ordinate levels of government. It is, therefore, idle to seek a complete solution to all problems by formal constitutional arrangement.²² A large sphere of operation must be left to politically negotiated adjustments. Nevertheless, flexible judicial interpretation, revised from time to time in the light of changing conditions, can do much to eliminate unnecessary rigidities. The courts must be free to re-examine the old assumptions and to modify them to meet new conditions.²³

The question in subsequent chapters is whether, in each major area of legislative power, the adjustments necessary to meet practical problems may be safely left to judicial review and such other devices of constitutional flexibility as are available, or whether in certain cases formal amendment to the constitution appears to be the only means of securing to the Province of Quebec the governmental powers which it requires.

Major constitutional revision may create more problems than it solves. Creating a whole new set of words can wipe out years of investment in predictability. It can yield unforeseen results, as unsatisfactory as those which it was intended to correct. The language of a constitution must be broad and flexible to permit of necessary

growth and adaptation. Most proposals for major constitutional revision are directed in part to re-wording and re-definition in modern idiom and tend, of necessity, to focus on categories and subject matter which have acquired a modern significance but may not retain their relative importance with the passage of time. Long judicial experience with familiar words, however archaic they may now appear, should not be lightly abandoned for some pretended clarification or modernization of terminology. A constitution cannot be a popular document, although it should reflect popular aspirations.

The relative needs of the two levels of government in Canada have undergone considerable change from time to time since Confederation. They may be expected to undergo substantial change in the future. The relationship between these two levels of government will in the final analysis be determined by their relative political importance and power in the country as a whole. Many adjustments will be the result of inter-governmental negotiation. Others may be left to the courts reading the needs of the times and the various manifestations of popular will from which the judiciary is never insulated. Formal constitutional amendment should be reserved for those problems for which there appears to be no other possible solution. It is suggested that such problems are relatively few.

6. The Crown in Canada.

There is plenty of evidence that French-Canadian attitudes towards the monarchy are strongly ambivalent: on the one hand, it is a British symbol, and as such, appears to favour the sentiments and

sense of identification of one of the ethnic groups at the expense of the others; on the other hand, it is impossible to deny that the Crown also stands reassuringly for a tradition of detachment and "fair play". In the result, it is frequently a cause of some misgiving and even irritation, but in an impersonal way, and the difficulty of subjecting the monarchy to the ordinary kind of political attack makes it unlikely that republicanism will ever become a strongly vocal or influential movement, except among those who are prepared to take the extreme and costly course of separatism.

There is no doubt, however, that the more that can be done to identify the monarchy with Canada's bicultural character, the more acceptable it will be as an institution to the people of Quebec. A good deal can be done in the way of popular education to reinforce French-Canadian pride in the leading role which French-Canadians have played in the preservation and adaptation of British public institutions in Canada. This is one of the most important functions to be performed by the mass media of communication: to make it possible for the various ethnic groups in Canada to share a legitimate pride in the history of the country's public institutions and to dissipate the feeling that this sense of pride is the peculiar privilege or heritage of those who can trace their origin to the British Isles. The prestige of the monarchy in Canada and its effectiveness as a national symbol will not long survive an exclusively ethnic pride of identification with it. But these reflections really fall outside the scope of this study. In effect, they point to but one conclusion, in so far as constitutional amendment is concerned: it is not realistic to contemplate

any essential change, in the foreseeable future, in the place and role of the monarchy in the Canadian constitution.

Naturally, we may expect a continuation of the law reform by which the Crown is gradually stripped of its privileged position in respect of legal liability and procedure and is placed on the same footing as any other legal entity in our society. This in no way detracts from its constitutional role and its conceptual utility in the legal order.

It is quite obvious that modern states can get along very satisfactorily without such an institution, but it has become such a familiar part of our constitutional theory and legal conceptualism that there seems to be no good reason to abandon it now, even if we put aside all question of sentiment. The challenge is not to replace the Crown as an institution but to continue to modernize it or civilize it, in its legal relations with the subject.

It may be, however, that serious consideration will have to be given to the direct appointment of the Lieutenant-Governors by the Sovereign, upon the advice of her provincial ministers. Indeed, the petitions recently addressed to the Queen by the Quebec legislature, in connection with reform of the Upper House, suggest that the general development of more direct relations between the provincial governments and the Sovereign could do much to revitalize Quebec appreciation of the monarchy as a part of our constitution. There is no doubt that there is much in British institutions and constitutional history that commands profound and even instinctive respect in French Canada, but the Crown should be "provincialized" and freed from the appearance of

federal domination and primary identification with the English-speaking element in the country. The indivisible Crown should become, if not divisible, at least many faceted, reflecting as far as possible a direct and immediate interest in and contact with the many and varied aspects of its Canadian realm.

We may also expect -- and indeed we are witnessing -- a re-adjustment of the roles of the federal and provincial Crown prerogatives. The most important of the prerogatives of the Crown in right of the Dominion is the power to conduct international relations, including the power to make war and peace. The aspect of this prerogative which has become a constitutional issue in recent years is the power to conclude binding international agreements. The issue has arisen primarily because of the desire of the Province of Quebec, referred to in the previous chapter, to enter into fruitful arrangements of a cultural, social and economic character with other French-speaking communities in the world.

Such contacts involve, from time to time, the necessity of making binding agreements and establishing more or less formal diplomatic relations. It is a striking proof of the role played by convention in the constant adaptation of a constitution to changing demands, that Ottawa and Quebec have been able to agree upon a procedure whereby Quebec may negotiate and conclude international agreements under the aegis of formal approval and consent by the Canadian government. The arrangement seems to be so effective and so satisfactory to both governments that it may be cited as a warning to those who pretend that radical formal changes of a constitutional nature are necessary to

permit Quebec to express itself. The achievements of the present Liberal administration in Quebec all point to the opposite conclusion: that almost everything essential may be achieved by the pragmatic adaptation of existing devices of constitutional flexibility.

Certainly, the understanding arrived at by the Canadian and Quebec governments has, for the time being at least, taken the urgency out of the question of Quebec's status in international law. It would not appear now that any constitutional amendment is necessary to permit the province of Quebec to develop those international relationships which it considers necessary for the pursuit of its general policy as the political instrument of French-Canadian emancipation and development.

There remains, however, a fundamental issue in connection with the conclusion and implementation of treaties between Canada and other states, and that is the necessity of and the procedure for securing provincial consent to the conclusion of treaties which require provincial legislation for their implementation. Here again, the issue is essentially one of constitutional practice or convention. The issue arises because the courts have held that the legislative jurisdiction to implement treaties -- other than that conferred by section 132 of the B.N.A. Act, which is confined to treaty obligations incurred by Canada as part of the British Empire -- follows the general distribution of legislative jurisdiction under the constitution. In a word, the Dominion executive or prerogative power to conclude treaties does not carry with it a plenary legislative power to implement them. The federal prerogative power in respect of external relations does not enlarge federal legislative power. This was the enormously significant holding (when one

considers the inevitably increasing importance of international agreements as the world community moves towards world legal order) of the decision of the Privy Council in the Labour Conventions case. As Lord Atkin put it:²⁴

... There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive. If the new functions affect the classes of subjects enumerated in s.92 legislation to support the new functions is in the competence of the Provincial Legislatures only. If they do not, the competence of the Dominion Legislature is declared by s.91 and existed ab origine. In other words, the Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth.

Because of this division of legislative jurisdiction in respect of the power to implement treaties, it is a matter not only of constitutional propriety but of common sense that the provinces should be consulted before the conclusion of any treaty which necessarily involves their legislative implementation.²⁵ In fact, the evolving practice with respect to provincial participation in the conclusion of international agreements suggests that the provinces will be increasingly encouraged, under the formal diplomatic aegis of the Canadian government, to negotiate the practical details of all agreements which deal with subjects falling within their legislative jurisdiction.

7. The General Basis of the Distribution of Legislative Jurisdiction Under the Present Constitution and Whether a Different Principle of Distribution Should Now Be Considered.

As a general rule, legislative jurisdiction is distributed under the present constitution according to the principle of exclusivity.

Exceptionally, as in the case of agriculture, immigration, and old age pensions, the constitution provides expressly for concurrent jurisdiction.

In fact, however, judicial reconciliation of the mutually exclusive spheres of jurisdiction described in sections 91 and 92 of the B.N.A. Act, has brought about a large measure of working concurrency, or more strictly speaking, co-existence of similar, if not identical, legislative powers.²⁶ This result has been achieved by the process of characterization of the subject matter of legislation and the application of the aspect doctrine²⁷ to support validity wherever possible and desirable, as a matter of constitutional policy. In the case of conflict between validly enacted federal and provincial laws, the courts apply the rule of paramountcy in favour of the federal legislation, unless, as in the case of section 94A concerning old age pensions, the rule is made expressly to apply in favour of the provincial laws.

The outstanding example of this effective or operative concurrency, resulting from judicial interpretation, is the relationship between the federal criminal law power and provincial regulatory jurisdiction, based essentially on the power over property and civil rights. The evolution of the case law²⁸ on this subject foreshadows the acceptance of duplication, or in other words, the valid co-existence of identical legislative provisions, and the limitation of the notion of conflict or repugnancy to cases in which there is a direct collision between two legislative provisions, as for example, where compliance with one involves breach of the other.

There are, however, limits to the power of judicial interpretation to attenuate the rigidities of an attribution of legislative

jurisdiction according to mutually exclusive compartments; and the question may be legitimately raised at this time as to whether the principle of exclusivity should not be replaced, at least in certain cases, by the principle of concurrency.

Concurrent jurisdiction is a constitutional basis for "co-operative federalism". It necessarily involves a working consultation and co-operation between the two levels of government, and this is a good thing from a constitutional point of view. Exclusivity demands that one legislature assume the entire responsibility for the regulation of a particular field and may well lead to legislation which goes farther than would be judged appropriate if legislative co-operation were constitutionally possible. It may be that the Parliament of Canada has more power under the present constitution than it really requires to safeguard and promote the national interest. The dominant intellectual and effective tone of our age is pragmatism, and the constitutional framework should be such as to facilitate and promote the pragmatic approach rather than frustrate it. A distribution of legislative power according to a principle of exclusivity is necessarily based on a priori assumptions concerning the relative importance of the various powers and is necessarily doctrinaire rather than pragmatic in its approach.

The most important field of concurrency at the present time under the Canadian constitution is the field of taxation. It is true that the provinces are restricted to direct taxation, but this in fact gives them a very large sphere of concurrency with the federal government. Concurrency in this most vital area of concern to modern governments has

not prevented the federal and provincial administrations from coming to mutually acceptable accomodations by means of political negotiation and legislative self-restraint, and indeed, does not prevent them from eliminating administrative duplication and waste. It is, further, an example of concurrency which operates effectively without a rule of paramountcy.

It is generally assumed, however, that the avoidance of irreconcilable conflict, in fields in which there is concurrent jurisdiction, cannot, as a general rule, be left to political wisdom and self-limitation, and that a principle of paramountcy is a necessary corollary of concurrent jurisdiction. The issue then arises as to where paramountcy should lie. Since the national interest is presumed to be more important than any local or regional interest, the normal assumption is that paramountcy should operate in favour of the legislation of the national or federal government. There is no reason to believe, however, that this rule is necessarily appropriate to all cases.

In question at this time is how far the present distribution of legislative power in the B.N.A. Act permits the courts, by application of the aspect doctrine, to introduce a working concurrency of legislative jurisdiction into the fields which are of principal concern today. There are certain fields of regulation which are presently divided between the federal and provincial legislatures. This is neither thorough-going exclusivity nor concurrency. An artificial abstract line is drawn through these areas of activity. Examples are trade and commerce, incorporation of companies, and works and undertakings.

It is obvious that trade and commerce cannot be wholly within exclusive federal jurisdiction. The issue is whether the provinces should have legislative jurisdiction to regulate inter-provincial and international aspects of trade and commerce, subject to a rule of paramountcy in favour of a concurrent federal jurisdiction over these aspects. In the case of the incorporation of companies, the issue is similarly whether there should be any limit on provincial jurisdiction -- whether there is any good reason why the provinces should not be able to create companies with power to do business outside of their territorial limits. Even in the case of works and undertakings of an inter-provincial character, there is possibly a case to be made for the substitution of a remedial or overriding federal legislative jurisdiction in place of the present exclusive jurisdiction which prevents provincial regulation even in the absence of federal legislation. The relationship of provincial power to inter-provincial works and undertakings is of such importance that it requires very careful re-examination.

The practical reason for these and other divisions of legislative power will be considered in subsequent chapters in an effort to determine whether there are not solutions which may more effectively reconcile the legitimate requirements of the national interest and the needs of the provinces for powers adequate to promote the development of their respective economies. Modification of the constitution should have as its principal object to render it a more flexible framework for the pragmatic pursuit of governmental objectives according to changing social and economic conditions, as well as significant shifts in relative political power and importance.

8. The Prohibition Against the Delegation of Legislative Jurisdiction.

The corollary of the distribution of legislative jurisdiction into mutually exclusive spheres is the constitutional principle which prohibits the delegation of legislative power between Parliament and the provincial legislatures.²⁹ Either legislature may, however, confer administrative authority upon an agency created by the other, provided that the legislation which confers such authority is otherwise validly enacted.³⁰ Such delegation is not a delegation of power to another legislature whose competence is limited by the terms of the B.N.A. Act, but merely involves the choice of a subordinate agency. The right of a legislature to delegate the power to make subordinate legislation has long been recognized.³¹

The question that poses itself, as a result of the cases on delegation, is the relative importance, from a practical point of view, of the prohibition against the delegation of legislative power. A good deal of flexibility and governmental co-ordination of policies may be achieved by the devices of conditional legislation and legislation by reference or adoption, neither of which is constitutionally prohibited, unless they amount to an abdication or effective abandonment of legislative jurisdiction or the assumption of a jurisdiction which a legislature does not possess.³² These devices, together with the delegation of administrative power, would appear to be sufficient to overcome most of the practical difficulties of divided jurisdiction by assuring uniformity of legislative treatment and the avoidance of administrative duplication. To achieve truly satisfactory results, however, there must, of course, be the political will to co-operate on the part of all the provinces.

It has been observed, however, that this is equally true of the delegation of legislative power and is a reason why the right to carry out such delegation would likely be of less practical importance than its inclusion in the "Fulton-Favreau" formula for constitutional amendment would seem to ascribe to it.

What would be of more practical consequence in the present constitutional context, but less likely politically, is delegation by Parliament of legislative jurisdiction to a provincial legislature. Such a temporary loan of legislative power, which would have the tendency to become permanent, might be a more flexible and pragmatic way of enabling Quebec, by means of its own political strength and bargaining power, to acquire the special status which it considered necessary from time to time without formalizing that status in the constitution itself.

9. Who is to be the Final Arbiter of Constitutional Policy?

There has been in recent years a certain amount of criticism, emanating from Quebec, of the role of the Supreme Court of Canada under the present constitution.³³ The essence of the criticism is that the Supreme Court is left with the ultimate responsibility of deciding where legislative power should rest as a matter of policy in each case. The complaint sometimes heard in Quebec is that with its present composition and method of appointment, the Court is not sufficiently representative of provincial interests.

There can be no doubt of the importance of the role played by the courts in the interpretation of the constitution. Rarely, if ever, are they clearly without policy options. One may take, for example, the

judicial interpretation of the "peace, order and good government" clause. The initial approach of the Privy Council to this clause was to regard it as the general basis of federal legislative power and the specific heads of jurisdiction in section 91 of the B.N.A. Act merely as examples of this general power.³⁴ Implicit in this interpretation was a view of federal legislative jurisdiction as being reserved for matters of concern to the country as a whole -- the broad distinction between national and local interests. Such an interpretation, if persisted in, would have enormously enlarged the potential scope of federal legislative action and permitted Parliament to be the constitutional judge of what matters required federal intervention in the national interest. The result would have been a constitution oriented around federal rather than provincial power. As the country developed and certain regulatory problems assumed a national significance inviting uniformity of legislative treatment, initiative would have passed in one important area after another to the federal government. Provincial legislative power would have been reduced to what was truly of exclusively local concern.

There is no doubt that such an interpretation of the "Peace, Order and Good Government" clause was clearly open to the courts as a constitutional option in terms of section 91. It required less judicial law-making than the narrower interpretation that has since prevailed, reducing this head of jurisdiction to one which is regarded as supplementary to the enumerated heads of jurisdiction in section 91 or applicable only in cases of exceptional emergency or necessity.³⁵ It is an illustration of the power of the courts to reshape a written constitution and even to alter its fundamental emphasis according to their own views of desirable constitutional policy for a federal state.

These great constitutional transitions or swings of emphasis can only be made cautiously across the bridge of carefully framed distinctions and sometimes of a number of narrowly decided cases where the grounds of judgment obscure the fundamental shift of policy that is propelling the court like a strong undertow. The process of constitutional interpretation is an evolving one. In their first encounters with a clause couched in very general terms, the courts do not approach their work with a clearly formulated conception of what the ultimate scope of the power should be. They must grope their way along, shaping, cutting and smoothing rough edges to meet the requirements of each issue. It is a plastic process, and it is only the fiction of stare decisis which forces on the courts the invidious task, as unsatisfactory to them as to their critics, of resorting sometimes to tortured and implausible logic to rationalize, distinguish and explain away difficult or ambiguous precedent. It is the result of the process that counts. Those who attack the courts as being the prisoners of formal logic often involve the same logic in support of their criticism.

The great question is whether the appearance of deciding these issues on the basis of formal criteria or legal abstractions should be maintained or whether they should be frankly and openly decided on the basis of political choice in the light of the particular social and economic facts, and if the latter, whether the decision should be entrusted to a political rather than a judicial organism. Should we create a new confederal institution -- a kind of "Supreme Council", in which not only the federal and provincial governments but the French-speaking and English-speaking communities would be suitably represented,

and to which an appeal could be made for the resolution of legislative and administrative conflicts when political negotiation had failed?

Most commentators today appear to assume that constitutional review by the courts of law is essential to a federal system, although there is some advocacy of a special constitutional court, on the West German model, with equal representation for the "two founding races". As Professor (now Mr. Justice) Laskin puts the case in favour of judicial review by the ordinary courts:³⁶

It may be true that 'Judges are not the most competent people to determine high matters of state'. But their tradition of impartiality and a security of tenure which mirrors their independence are offsetting compensations. We are saddled in any event with judicial review so long as our federal system subsists.

And in a similar vein, Dean W. R. Lederman, Q.C., who speaks of judicial review by the superior courts as a fundamental principle of our constitution, has said:³⁷

The need for final judicial review of the federal distribution of legislative power has roots in the necessities of a federal system. Neither the federal Parliament nor the provincial legislatures could be permitted to act as judges of the extent of their own respective grants of power under the BNA Act. If they were, soon we would have either ten separate countries or a unitary state. Nor are such issues of interpretation suitable for determination by voting in some kind of a special body composed of numerous delegates or representatives assembled for the purpose. In the end this would simply mean majority rule or deadlock through minority veto. Rather, the interpretative process is best carried out in one of our traditional superior courts where, by submission and argument, appeal can be made to the reason, understanding, and sense of values of impartial judges who enjoy secure and permanent tenure during good behaviour.

On the other hand, both Laskin and Lederman advocate that judicial review be placed on a more scientific or statesmanlike plane by consideration of the social and economic facts underlying the issues. This, of course, necessarily involves a radical change in the traditional attitude of the courts towards resort to extrinsic aids in interpretation.³⁸ Lederman, frankly acknowledging the policy function of the courts in determining the "aspect" of legislation which is to be considered dominant for purposes of constitutional classification, urges "a more intensive and extensive judicial appreciation of the social, political, economic and cultural facts that give the various aspects of challenged laws their qualities of relative importance".³⁹

Thus the institutional conservatives at the present time tend to exhibit a liberal conception of the function of judicial review. In contrast, Professor Jacques-Yvan Morin, who advocates considerable institutional innovation by the creation of a specialized constitutional court, on the West German model, with equal representation for the French-speaking and English-speaking peoples and a major reorganization of the present Supreme Court of Canada into common-law and civil-law divisions for private law purposes, is quite conservative in his conception of the function of judicial review, as indicated by the following passage:⁴⁰

Of course, the interpretation of such a basic document can never escape entirely the influence of political circumstances lato sensu. However, there should be limits to the discretion of constitutional judges. What has happened in the United States, for instance, is one of the things that must be avoided in this country, at least in relation to Quebec. The essential raison d'être of federalism, in a bi-national country like Canada, should be to protect the values and rights of the constituent groups and their autonomy, even against the will of the majority group. If you introduce into the Constitution a 'principle of growth',

such as that which has been developed in the United States, and the techniques of interpretation which are corollaries of this principle, you can have no stability in constitutional matters and no feeling of security, at least in French Canada. The adaptation of the fundamental law to new circumstances should be left to the responsibility of the constituent organ of the federation and of the political arm of the government. If these do not assume this responsibility, it should not be within the province of the Constitutional Court to fill the shoes of the legislator.

It is understood that the composition and function of the Supreme Court of Canada, particularly in relation to the civil law of Quebec, is the subject of another study to be submitted to this Commission so that it is neither necessary nor perhaps appropriate to enter into an elaborate discussion of the question in this paper. This writer does not conceal his own opinion, however, that criticisms of the Supreme Court of Canada, based on the alleged political or cultural bias of its members, does the Court great injustice and reveals a superficial and over-simplified view of the judicial function at this level. It is simply not true historically to suggest that the Supreme Court has shown an unvarying bias in favour of central power. On the contrary, it is generally recognized that the late Sir Lyman Duff, perhaps the greatest judge that Canada has produced, was, together with Lord Watson and Lord Haldane in the Privy Council, one of the principal exponents of provincial power under the constitution. His opinions are replete with expressions of concern that provincial jurisdiction not be swallowed up by a literal interpretation of certain of the federal powers.⁴¹ His repeated insistence upon the distinction between exclusive jurisdiction and accessory or necessarily incidental power, with its corollary of the "unoccupied field", is striking evidence of his desire to adjust the distribution of legislative jurisdiction under sections 91 and 92

so as to give reasonable scope to provincial power, in the absence of federal legislation.⁴² Many of his dicta anticipate the present-day emphasis on co-operative federalism.⁴³ One finds, in case after case, that the principles enunciated by him still have the breath of constitutional life in them and are better adapted than the dogma of either the "centralizers" or the "provincial autonomists" to the adjustment of the constitution to modern needs. An example is the broad and far-seeing approach to section 96 of the British North America Act respecting the appointment of judges to provincial courts that is to be found in his opinion in the Reference re Adoption. With such an example in the history of the Court it is ungrateful and ill informed to suggest that its English-speaking members have been in the grip of a federal bias which has prevented them from doing justice to the legitimate requirements of provincial autonomy. One could cite other examples. A judge as conscious of the constitutional requirements of the federal government as Mr. Justice Rand could say of a federal attempt, under the guise of criminal law, to prohibit the manufacture of margarine within a province:⁴⁴

The public interest in this regulation lies obviously in the trade effects; it is annexed to the legislative subject matter and follows the latter in its allocation to the one or other legislature. But to use it as a support for the legislation in the aspect of criminal law would mean that the Dominion under its authority in that field, by forbidding the manufacture or sale of particular products, could, in what it considered a sound trade policy, not only interdict a substantial part of the economic life of one section of Canada but do so for the benefit of that of another. Whatever the scope of the regulation of interprovincial trade, it is hard to conceive a more insidious form of encroachment on a complementary jurisdiction.

These are not the words of a judge indifferent to provincial jurisdiction.

The truth is that, just as in the case of the Privy Council, the constitutional decisions of the Supreme Court of Canada have exhibited shifts of emphasis in response to changing conditions. There is no doubt that the decisions of the Court in the immediate post-war period, and particularly during the fifties, exhibited a strong reaction against the erosion of federal power produced by the Privy Council decisions, but it would appear that present critics of the Court are not sufficiently aware of the reaction which has set in once again in favour of provincial rights.⁴⁵ The process is a constant one of trying to maintain a viable equilibrium, and the Courts cannot be blamed for not always perceiving the full implications of a particular decision or affirmation of principle. In order to introduce a more measured and controlled precision in its function of constitutional interpretation, it would appear that the Supreme Court is now more disposed than it was in the fifties to decide cases on the narrowest possible ground in order to avoid having future issues inadvertently decided by broad and sweeping generalizations.⁴⁶

It is technically true that the judges of the Supreme Court of Canada do not enjoy the constitutionally guaranteed security of tenure of the judges of the provincial superior courts,⁴⁷ but it is preposterous to suggest that this in fact undermines their sense of judicial independence, since no federal government could survive an attempt to tamper with such independence. When men are raised to the highest judicial office in the land they may be presumed to have every disposition not only to discharge the responsibilities of that office to the best of their ability in the interests of their fellow countrymen, but to be well judged by the more detached perspective of history. Neither competence nor integrity is guaranteed by a

parochial experience or outlook. The supreme judicial tribunal of Canada must not become an assembly of representatives of the various governments in the country. A man can feel the political, economic and social changes in his country and be responsive to the need of accommodating them within the constitutional forms without having a bias in favour of either federal or provincial government. It is an insult to the kind of intelligence which should be the first requirement of appointment to high judicial office to suggest that it should permanently reflect its gratitude for such appointment in the character of its work. It is a difficult thing to build up respect for the institutions of one's country, and a relatively easy thing to undermine that respect, and it is high time that we stopped making political propaganda with an institution of which Canadians have every reason to be proud.

CHAPTER III. LANGUAGE AND EDUCATIONAL RIGHTS

1. The Extent to Which the 'Equal Partnership' Concept Should Be Reflected in the Constitution.

Assuming that the political assumption or premise on which any consideration of constitutional revision must proceed is that the Canadian federation is to be regarded essentially as an equal political association between the two founding races, it is necessary to consider the extent to which this relationship ought to be embodied and protected by the constitution.

There is, first, the question of a general recognition of French Canada's status, politically and culturally, within the Canadian federation and, secondly, the question of specific rights which might be guaranteed by the constitution. As to the first, it is highly questionable whether there is any practical purpose to be served by an amendment to the preamble to the constitution which would proclaim the equal partnership principle.¹ Such a declaration would only attract political opposition without adding anything of substance to the facts of political life in Canada, unless it were implemented in the constitution itself by a series of provisions which did in effect make the Canadian federation an association of two states. This is the logical conclusion of the equal partnership notion, and since this cannot be assumed to be desired by the majority of French-Canadians, not to speak of the country as a whole, it is better to leave this concept as a working political principle to be applied as circumstances permit. The essence of the equal partnership notion is the widest possible recognition and practice of bilingualism and the assurance to

French-Canadians of a fair share of power and influence in the country. These matters are better left to goodwill and sound judgment operating under the influence of political and social realities largely shaped by the efforts of French-Canadians themselves. Public administration would be seriously handicapped by any rule requiring a fixed proportion of French-Canadian personnel in various offices. Such a rule would in fact embody a principle of discrimination when French-Canadians claim to be seeking only equality of opportunity.

The bilingual and bicultural character of Canada -- and accordingly, the concept of a working partnership between the two races or language groups -- is sufficiently reflected and emphasized by the constitutional guarantee of the right to the use of the French language. Accordingly, the essential issue, from the cultural point of view, is whether there should be any amendment to section 133² and section 93³ of the B.N.A. Act to extend the recognition of French as an official language and to guarantee to French-Canadians the right to education in their own language anywhere in Canada.

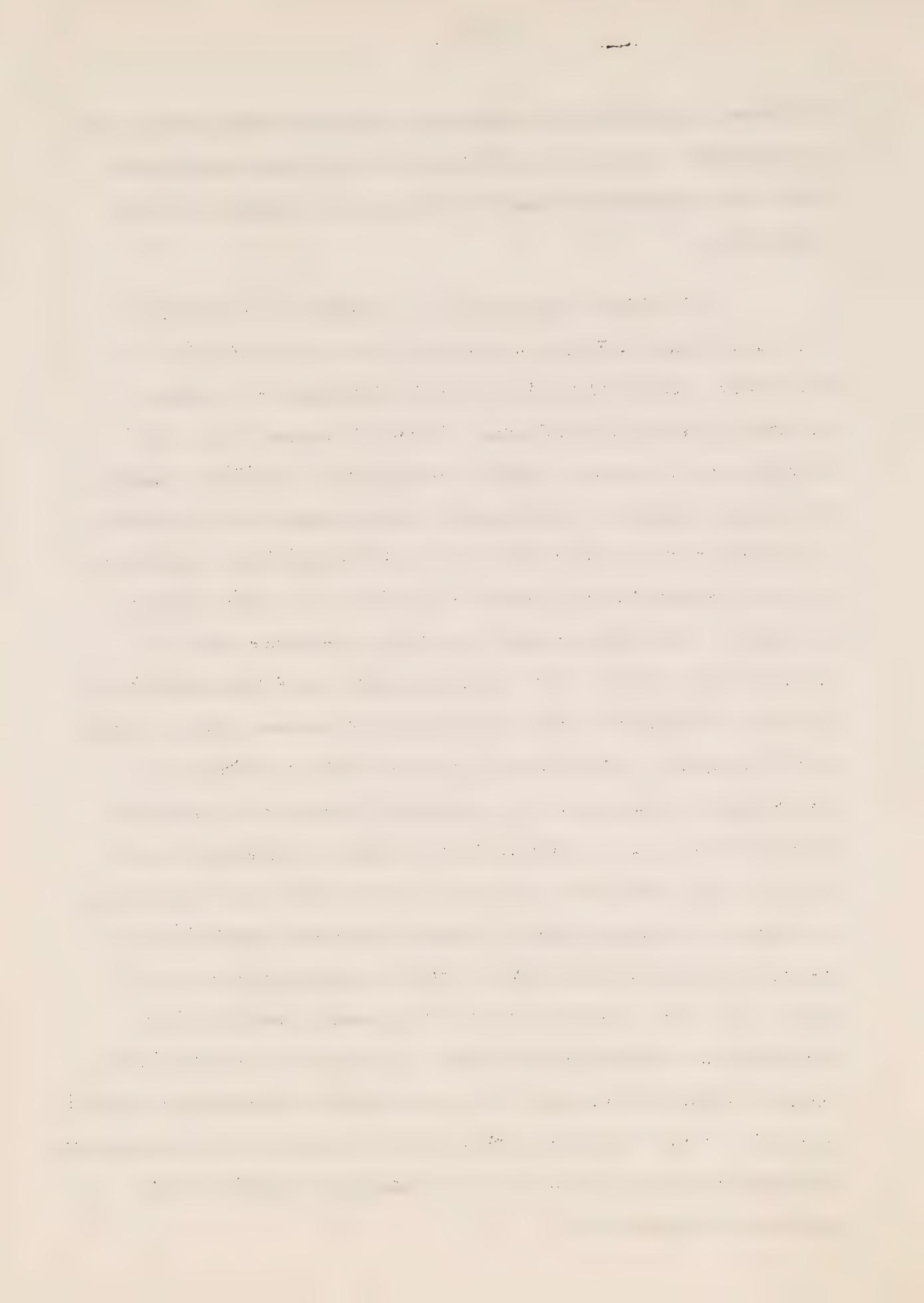
2. Recognition of the French Language in Public and Private Institutions.

Section 133 of the B.N.A. Act is confined to the use of the two official languages in legislatures and courts. It does not refer to the civil service or public bodies generally. Moreover, Quebec is the only province in which French is an official language to this limited extent.

It would seem that the obvious amendment to section 133 would be to extend its application to the use of both French and English in

the federal and Quebec civil services and all public bodies falling under the legislative jurisdiction of Parliament and the Quebec Legislature. These would include administrative tribunals and municipal and school corporations.

It is difficult to see how the constitution can effectively deal with the use of French in other than the public institutions of the country. The development of a working bilingualism in business and other private and social areas of Canadian life must be promoted by other means: education, media of communication, political pressure, and personal influence. Consideration should perhaps be given, however, to whether or not Parliament and the provincial legislatures should have the power to make the use of French a condition of specific rights or privileges. For example, should a provincial legislature have the right to prescribe that certain businesses must assure the conditions of a working bilingualism or that certain kinds of contract shall be awarded only to companies in which there is a certain relative proportion of French-Canadian personnel? It is sufficient to pose such questions to conclude that any such constitutionally recognized⁴ governmental power would be highly undesirable. In fact, a governmental policy to encourage the spread of bilingualism and to increase employment opportunities at various levels of responsibility for French-Canadian personnel can be pursued and, from a practical point of view, must be pursued by more subtle means of pressure and persuasion. Once again, we are faced with a choice between the principle that no one should be discriminated against on account of race, language or religion and a principle that is essentially discriminatory since it makes the use of language a condition of the enjoyment of certain rights.



Should the constitution make French an official language in the legislatures, courts, civil service and public bodies generally of the other provinces? The only other provinces to which section 133 of the B.N.A. Act might be reasonably extended at this time are New Brunswick and Ontario, where there are French populations of sufficient relative importance. For the other provinces, the present alternatives are to provide in section 133 that French shall become an official language of the province when its French-speaking population reaches a certain proportion or to leave the matter entirely to the decision of the provincial legislatures.⁵ The merit of the first alternative is that it might well encourage French-Canadian mobility in Canada, which is the chief means by which a working bilingualism will be spread throughout the country. On the other hand, the evolution of attitudes in Canada might well lead other provinces to decide to make French one of the official languages in their legislatures, courts and public administration before the French-Canadian population had reached a certain specified proportion.

We are confronted here with the delicate choice between the practical efficacy of defining minimum rights and their conditions in law and leaving the recognition of such rights to the sense of practical necessity or propriety which springs from the natural evolution of social conditions and attitudes. Those who bargain hard for firm guarantees often obtain less in the long run than those who appeal, under appropriate conditions, to a sense of fair play and even generosity. These are contentious problems, and the inertia of governments is such that they prefer to rest on their legally defined responsibility rather than to make the difficult judgment of what is politically opportune or

necessary. On this question of bilingualism, therefore, the French-Canadians are probably better advised to rely on the continued development of a climate of public opinion favourable to the wider recognition of the French language and culture than to attempt at this time to redefine their claims in what must be, for practical constitutional purposes, the barest minimum of requirements.

3. The Right to Education in the French Language.

The constitutional guarantee of educational rights and privileges under section 93 of the B.N.A. Act is based on religion and not on language. This was made clear by the decision of the Privy Council in Trustees of the Roman Catholic Separate Schools for the City of Ottawa v. Mackell⁶ where it was held that the legal rights or privileges of Roman Catholics with respect to their denominational schools at Confederation did not include "the right to decide as to the language used as a means of instruction".

The guarantee in section 93 of the rights and privileges enjoyed at Confederation by religious communities with respect to denominational schools has given important protection to the Protestant minority in Quebec, but has not on the whole given satisfaction to the Roman Catholic, and in particular French-speaking, minorities in the other provinces. This is a consequence of two factors: first, the condition in subsection 1 of section 93 that the right or privilege guaranteed by this subsection must be one which was enjoyed at Confederation as a matter of law and not merely of practice or toleration; and secondly, the failure for one reason or another of the federal



MEMORANDUM

CLASSIFICATION

R. FRITH

TO : Ceux qui ont reçu l'étude LeDain
A : (Div. II Report no. 8)

YOUR FILE No.
Votre dossier

OUR FILE No.
Notre dossier

FROM : Centre de recherches

DATE

FOLD

SUBJECT :
Sujet

La page 62 du rapport LeDain a été refaite et nous vous demandons de remplacer la page 62 présentement dans votre texte par la page 62 révisée que vous trouverez ci-jointe.

pièce jointe

remedial legislative power conferred by subsection 4 of section 92 to offer any effective protection for the educational position of religious minorities in a province.

The effect of the judicial decisions on section 93 is that the right to establish separate or denominational schools does not carry with it the right to exemption from taxation for the support of common or public schools, unless such exemption was clearly provided for by law at Confederation. In Quebec, the provincial law has always been clearly to the effect that once a religious minority establishes separate or dissentient schools, it is relieved of further tax liability for the support of common schools. This is also the case in Ontario. But with the exception of these two provinces, the rule would appear to be double taxation for those dissentient minorities who choose to establish denominational schools.

These then are the substantial grievances of French Canada with respect to constitutional rights in relation to education: double taxation, if one chooses to establish separate schools; and the absence of a guaranteed right to education in the French language. They are accordingly the matters to be given first consideration in any discussion of possible amendment to section 93.

The difficulty in reaching a satisfactory conclusion respecting educational guarantees is that there is a considerable evolution of thought and, indeed, practice with respect to the desirability and the appropriate position in the educational system of denominational schools. Indeed, in Quebec there is a strong current of opinion tending, it would seem, to the acceptance of the principle that all schools to

be supported by taxation and regulated by the provincial authorities should be common or public schools. It is uncertain; however, how long it will take for this idea to gain sufficient public acceptance, in the Roman Catholic community, to permit of legislative implementation. But this current of opinion is of sufficient importance at the present time to raise a serious question as to the wisdom of re-affirming and perhaps extending, in the form of a constitutional guarantee, the principle of separate or denominational education. Such a constitutional provision might well frustrate the achievement of an important step in educational progress.

The whole emphasis in terms of educational rights and privileges is shifting from a religious to a linguistic one. What is likely to be the real issue in the years ahead is the right of the French-speaking population to public schools in which the instruction is in the French language. No doubt, it would be politically unwise to attempt, at this time, to abolish the essentially religious safeguards which presently exist in section 93, but serious consideration should be given to an amendment of this section which would permit provincial legislatures in the provinces affected to enact legislation abolishing such rights and privileges, with the approval of the members of the religious communities concerned. Such an amendment might provide for a referendum and a specified majority of the voting members of the religious community affected as conditions precedent to any such legislation. Section 93 might be further amended to impose upon provincial governments the obligation to provide, out of general taxation, for district or regional French language public schools within a defined radius of urban centers having a specified minimum population, when the French-speaking population



in such areas has reached a specified relative proportion. Alternatively, or additionally, provision might be made for the right of French-speaking communities to establish separate schools for instruction in the French language with exemption from taxation for the support of other schools in the province.

The establishment of French-speaking schools throughout the country is the surest means not only of promoting a national bilingualism but of facilitating that national mobility of the French-Canadian population which will break down the cultural isolation of the province of Quebec. There is no doubt that many persons of the English language will choose to send their children to French-speaking schools in order to equip them better for life in this country as long as such schools do not have a religious or denominational character.

Another question in connection with education is whether it is desirable that the constitution should require a certain minimum amount of instruction in the French language in all the public schools in the country. It would seem that this is a question which should not be dealt with in a constitution but should be left to the judgment of educational authorities. It is the kind of administrative regulation which can only make for impractical rigidity when given the status of a constitutional guarantee.



CHAPTER IV. SHOULD THERE BE AN ENTRENCHED BILL OF RIGHTS?

The issue to be considered in this chapter is whether there should be, as part of a general constitutional revision, a written statement or affirmation of human rights and fundamental freedoms incorporated or "entrenched" in the constitution. To appreciate this issue, it is necessary to consider the effect of such a Bill of Rights.

It would be, first, a limitation upon the legislative power of Parliament and the provincial legislatures. In effect, it would mean that any federal or provincial law which prejudicially interferred with such rights or freedoms beyond the limits permitted by the Bill of Rights would be constitutionally invalid to the extent of such interference. Secondly, it would create certain rights which the courts would be obliged to secure to the citizen in his relations with public authorities. Thirdly, it would contain certain prohibitions which would affect the validity of private agreements and even the legality of certain conduct between private individuals. A comprehensive Bill of Rights thus encompasses a very wide spectrum of governmental and non-governmental activity and raises at once, in a federal state, the fundamental issue of the distribution of legislative and executive power to affect such rights and freedoms. Before considering this question, however, it is well to make a few observations about the traditional approach towards the basis and protection of such rights and freedoms under the British system of parliamentary government.

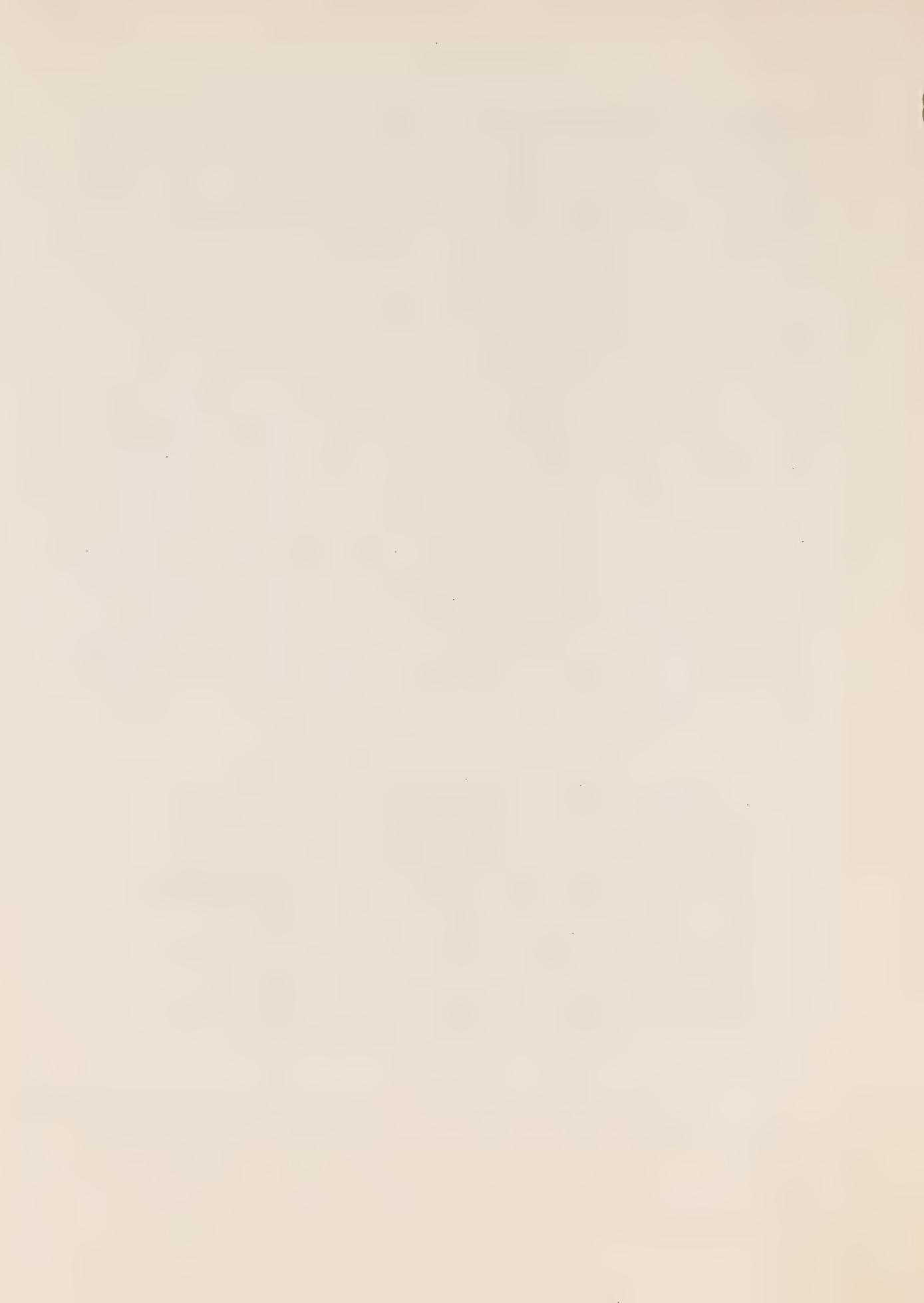
Under the traditional British system, the core of which is the principle of parliamentary sovereignty, the protection of human



rights and fundamental freedoms has been regarded as an aspect of the Rule of Law. This notion, which was made famous by A. V. Dicey,¹ is at bottom nothing more than reliance on legislative self-restraint, administrative fairness, and judicial independence for the protection of fundamental rights and freedoms. Under the traditional British system, such protection has rested, in the final analysis, on an enlightened public opinion which demands that public authority shall pursue its purposes of order and general welfare with due regard for the personal liberties of the subject. The Rule of Law is a philosophy of government rather than a legal or constitutional restraint upon it. It is a standard to which public opinion can appeal, and it is generally regarded to be effective in the measure that such public opinion is informed, aware, and prompt to detect and challenge acts which threaten these rights and freedoms. In the words of the late Mr. Justice Robert Jackson of the Supreme Court of the United States:²

I have been repeatedly impressed with the speed and certainty with which the slightest invasion of British individual freedom or minority rights by officials of the government is picked up in Parliament, not merely by the opposition but by the party in power, and made the subject of persistent questioning, criticism, and sometimes rebuke. There is no waiting on the theory that the judges will take care of it. In this country, on the contrary, we rarely have a political issue made of any kind of invasion of civil liberties In Great Britain to observe civil liberties is good politics and to transgress the rights of the individual or the minority is bad politics. In the United States, I cannot say that this is so.

It is this general approach that has made Englishmen traditionally skeptical of the practical importance or efficacy of an entrenched Bill of Rights. The following statement by Sir Ivor Jennings³ is a characteristic expression of this view:



... In Britain we have no Bill of Rights; we merely have liberty according to law, and we think -- truly, I believe, -- that we do the job better than any country which has a Bill of Rights or a Declaration of Rights of Man.

There is skepticism about the value or practical efficacy of a Bill of Rights, not merely because it is worthless if there is not popular insistence upon its implementation in day to day procedural detail, but because it suggests that fundamental freedoms find their source in positive enactments rather than in the absence of valid prohibitions, and secondly, because it must necessarily express fundamental rights and freedoms in essentially unqualified and oversimplified terms. It must necessarily say both too little and too much. It cannot encompass the whole range of liberty and the means by which it is effectively secured, nor can it reflect the necessary qualifications to be read into the limitations which it imposes upon legislative power if these rights and freedoms are to be secured to all in an ordered society.

It is the British approach which has applied in Canada, at least up to federal enactment of the "Canadian Bill of Rights" in 1960, subject to one important qualification: the effective restraint imposed by the distribution of jurisdiction under the B.N.A. Act upon federal and provincial legislative power to interfere with fundamental rights and freedoms. Before considering the effect of the Canadian Bill of Rights, it is well to attempt to evaluate the extent to which these rights and freedoms have been effectively protected in Canada by judicial interpretation operating in the context of the B.N.A. Act.

In recent years, the Supreme Court of Canada, basing itself on the provisions of the B.N.A. Act and upon provincial law respecting civil responsibility, has been able to offer substantial protection of freedom of speech, freedom of conscience, freedom of assembly, and freedom from arbitrary arrest. As a result of these judicial decisions it cannot be said the Canadians have been left with the impression that their civil liberties are less effectively protected under the present constitution than they would be under an entrenched Bill of Rights.

The most important qualification of the political or public right of free speech has been the law concerning sedition, which is chiefly directed to criticism of public authority that exceeds the bounds of what is considered to be safe or permissible. The definition of sedition or seditious libel, from time to time, marks the permissible limits of political dissent or protest, as well as what is legitimate in the way of criticism of principles or notions held by particular groups in the community. In Boucher v. The King,⁴ where the issue was whether the accused, a Witness of Jehovah, was guilty of seditious libel for having published or distributed a pamphlet which was strongly critical of the administration of justice in the Province of Quebec, the Supreme Court of Canada, upon re-hearing, laid down a definition of seditious libel, based on the provisions of the new Criminal Code, which considerably expanded the area of free speech, as such was previously delimited by the common law. In effect, the Court held that language is not seditious, no matter how displeasing or offensive it may be to public persons or groups within the community unless there is the intention to incite to violence, or to resistance to or defiance of constituted authority.

In tracing the history of the commonlaw crime of seditious libel, Rand J. emphasized that the law must keep pace with changing and more liberal views of the nature of government. He said:⁵

Up to the end of the 18th century, it was, in essence, an attempt in words of political authority or the actions of authority. If we conceive of the governors of society as superior beings, exercising a divine mandate, by whom laws, institutions and administrations are given to men to be obeyed, who are, in short, beyond criticism, reflection or censor upon them or what they do implies either an equality with them or an accountability by them, both equally offensive. In that lay sedition by words and the libel was its written form.

But constitutional conceptions of a different order making rapid progress in the 19th century have necessitated a modification of the legal view of public criticism; and the administrators of what we call democratic government have come to be looked upon as servants, bound to carry out their duties accountably to the public. The basic nature of the Common Law lies in its flexible process traditionally reasoning upon significant social and political matter; and just as in the 17th century the crime of seditious libel was a deduction from fundamental concepts of government, the substitution of new concepts under the same principle of reasoning, called for new jural conclusions

Thus the Boucher case is a striking example of the traditional commonlaw function of judges to interpret the statute law in such manner as to afford the greatest possible protection to personal liberties. The protection afforded to the accused in the Boucher case did not flow from any constitutional guarantees, nor was it the accidental result of divided legislative jurisdiction under the B.N.A. Act, but rather was the direct effect of modern and liberal conceptions of political philosophy operating, as a matter of statutory interpretation, upon the provisions of the Criminal Code of Canada. With respect to the specific issue in the Boucher case -- that is, how far the criminal law is to tolerate expressions of opinion that create ill will and even

hostility among various groups in the community, these liberal concepts are reflected in the following passage from the opinion of Rand J.:⁶

There is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency: what is the degree necessary to criminality? Can it ever, as mere subjective condition, be so? Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in mortals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability. Similarly in discontent, affection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, the clarification of thought and, as we believe, in the search for the constitution and truth of things generally.

In the Padlock Act case,⁷ we find an important decision in favour of free speech, based on the obstacle presented by federal control over the criminal law to legislative attempts by the province to interfere with this right. This, then, is an instance of the protection of civil liberties in Canada, at least against provincial legislative interference, which is the incidental result of divided jurisdiction in a federal state. But once again, certain members of the Supreme Court of Canada took advantage of the opportunity to enunciate certain broad principles concerning the nature and essential basis of political liberty in Canada, and one judge went as far as to suggest that there

was inherent, in the pre-supposition of the B.N.A. Act that Canada should have a parliamentary constitution similar to that of the United Kingdom, a constitutional guarantee against legislative interference with the right of free speech not only by the provincial legislatures but by Parliament itself.⁸ While the decision of the Court turned essentially on the conclusion that the provincial legislation, directed to suppression of communist activity, was an invasion of exclusive federal power over the criminal law, it was said by Rand J.:⁹

Indicated by the opening words of the preamble in the Act of 1867, reciting the desire of the four Provinces to be united in a federal union with a constitution "similar in principle to that of the United Kingdom", the political theory which the Act embodies is that of parliamentary government, with all its social implications, and the provisions of the statute elaborate that principle in the institutional apparatus which they create or contemplate. Whatever the deficiencies in its workings, Canadian government is in substance the will of the majority expressed directly or indirectly through popular assemblies. This means ultimately government by the free public opinion of an open society, the effectiveness of which, as events have not infrequently demonstrated, is undoubted.

But public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas. Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles. Under that government, the freedom of discussion in Canada, as a subject-matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion. With such dimensions it is ipso facto excluded from head 16 as a local matter.

This constitutional fact is the political expression of the primary condition of social life, thought and its communication by language. Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence. As such an inherence in the individual it is embodied in his status of citizenship.

In a similar vein, but going even further in its implications of constitutional guarantee, is the following statement by Abbott J.:¹⁰

The Canada Elections Act, the provisions of the British North America Act which provide for Parliament meeting at least once a year and for the election of a new parliament at least every five years, and the Senate and House of Commons Act, are examples of enactments which make specific statutory provision for ensuring the exercise of this right of public debate and public discussion. Implicit in all such legislation is the right of candidates for Parliament or for a Legislature, and of citizens generally, to explain, criticize, debate and discuss in the freest possible manner such matters as the qualifications, the policies, and the political, economic and social principles advocated by such candidates or by the political parties or groups of which they may be members.

This right cannot be abrogated by a Provincial Legislature, and the power of such Legislature to limit it, is restricted to what may be necessary to protect purely private rights, such as for example provincial laws of defamation. It is obvious that the impugned statute does not fall within that category. It does not, in substance, deal with matters of property and civil rights or with a local or private matter within the Province and in my opinion is clearly ultra vires. Although it is not necessary, of course, to determine this question for the purposes of the present appeal, the Canadian constitution being declared to be similar in principle to that of the United Kingdom, I am also of opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate. The power of Parliament to limit it is, in my view, restricted to such powers as may be exercisable under its exclusive legislative jurisdiction with respect to criminal law and to make laws for the peace, order and good government of the nation.

This notion, that the B.N.A. Act postulates or pre-supposes free parliamentary institutions with the essential supporting rights and freedoms required for their democratic and constitutional operation, derives judicially from what was said by the late Sir Lyman Duff in Reference re Alberta Statutes,¹¹ where the issue, in part, was the validity of provincial legislation directed to a measure of governmental control of the press. In a decision which affirmed, in effect, that freedom

of the press in Canada cannot be regulated by provincial legislation to the extent of interfering substantially with the working of Canadian parliamentary institutions, Duff C.J. said:¹²

Under the constitution established by The British North America Act, legislative power for Canada is vested in one Parliament consisting of the Sovereign, an upper house styled the Senate, and the House of Commons. Without entering in detail upon an examination of the enactments of the Act relating to the House of Commons, it can be said that these provisions manifestly contemplate a House of Commons which is to be, as the name itself implies, a representative body; constituted, that is to say, by members elected by such of the population of the united provinces as may be qualified to vote. The preamble of the statute, moreover, shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.

The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in James v. Commonwealth, "freedom governed by law."

Even within its legal limits, it is liable to abuse and grave abuse, and such abuse is constantly exemplified before our eyes; but it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.

We do not doubt that (in addition to the power of disallowance vested in the Governor General) the Parliament of Canada possesses authority to legislate for the

protection of this right. That authority rests upon the principle that the powers requisite for the protection of the constitution itself arise by necessary implication from The British North America Act as a whole (Fort Frances Pulp & Power Co. Ltd. v. Manitoba Free Press Co. Ltd.); and since the subject-matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament.

But this by no means exhausts the matter. Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would, in our opinion, be incompetent to the legislatures of the provinces, or to the legislature of any one of the provinces, as repugnant to the provisions of The British North America Act, by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion legislation enacted pursuant to the legislative authority given by those provisions. The subject matter of such legislation could not be described as a provincial matter purely; as in substance exclusively a matter of property and civil rights within the province, or a matter private or local within the province. It would not be, to quote the words of the judgment of the Judicial Committee in Great West Saddlery Co. v. The King, "legislation directed solely to the purposes specified in section 92"; and it would be invalid on the principles enunciated in that judgment and adopted in Caron v. The King.

The question, discussed in argument, of the validity of the legislation before us, considered as a wholly independent enactment having no relation to the Alberta Social Credit Act, presents no little difficulty. Some degree of regulation of newspapers everybody would concede to the provinces. Indeed, there is a very wide field in which the provinces undoubtedly are invested with legislative authority over newspapers; but the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of The British North America Act and the statutes of the Dominion of Canada. Such a limitation is necessary, in our opinion, "in order," to adapt the words quoted above from the judgment in Bank of Toronto v. Lambe "to afford scope" for the working of such parliamentary institutions. In this region of constitutional practice, it is not permitted to a provincial legislature to do indirectly what cannot be done directly (Great West Saddlery Co. v. The King).

Here, then, is a constitutional guarantee of political rights, at least in so far as provincial interference is concerned, and it requires only adoption of the view expressed by Abbott J. in the Padlock Act case to make it as fully effective as any explicit and entrenched Bill of Rights could be with respect to everything that is implied, both as to means and content, by what was referred to in the Alberta Press case as "the right of public discussion". This right is nothing less than the very foundation of free and responsible government.

There are other rights or freedoms which had found adequate protection in Canada through the judicial process prior to the enactment of the Canadian Bill of Rights in 1960. Freedom of worship or conscience found protection from provincial legislation and police interference in a series of decisions involving the Witnesses of Jehovah. In Saumur v. The City of Quebec and the A-G for Quebec,¹³ the Supreme Court of Canada held that freedom of religion was beyond the reach of provincial legislative interference, whether federal jurisdiction in respect of this matter is based on the criminal law power or the residuary scope of the peace, order and good government clause. In effect, the Saumur case was concerned with that aspect or expression of freedom of speech, including specifically, freedom of the press (since the distribution of the printed word was involved) which is a necessary corollary of freedom of worship, including the right to carry on effective proselytization. It should be observed, however, that the decision in the Saumur case was by the narrow majority of one in a court that was sharply divided as to the constitutional characterization of the right of freedom of worship, the minority holding that it was a civil right within the

provinces falling neither under the peace, order and good government clause nor under the criminal law power.

It was sufficient in the Saumur case, for purposes of the majority opinion, to rest the judgment upon the provincial Freedom of Worship Act, as being a pre-Confederation statute, with validity based on section 129 of the B.N.A. Act and now beyond the reach of provincial amendment or repeal, but it is noteworthy that both Rand and Kellock JJ. referred to the principle enunciated in the Alberta Press case. It is difficult, however, to perceive the precise relationship between freedom of religious expression and the operation of parliamentary government, unless one takes the view that freedom of speech must be considered to be an indivisible right which, subject to the necessary restraints imposed by the criminal law, cannot be broken down for purposes of legal protection according to the ideas or objects which it is intended to express or promote.

Protection of freedom of worship in the Saumur case resulted, as in the Padlock Act decision, from the division of jurisdiction under the B.N.A. Act and was a consequence of the limitations of provincial legislative jurisdiction. Other decisions have served to emphasize the important function performed by the provincial law of civil responsibility in the effective affirmation and protection of fundamental rights and freedoms. In the cases of Chaput v. Romain¹⁴ and Lambe v. Benoit,¹⁵ provincial police officers were condemned in damages for acts of interference with religious liberty. In the Chaput case, members of the provincial police broke up a peaceful and orderly religious meeting of Jehovah's Witnesses in a private home. In a unanimous

judgment, the Supreme Court of Canada held the act of the police officers to be unlawful, if not criminal, and condemned them to pay damages. This judgment may be regarded as an affirmation of both freedom of worship and the related freedom of assembly.

In the Lambe case a police officer was condemned by the Supreme Court of Canada to pay damages for the false arrest, imprisonment, and malicious prosecution of a Witness of Jehovah.

In the case of Chabot v. Les Commissaires d'Ecole de L'Amorandière,¹⁶ where the Court of Appeal of the province of Quebec held that a Witness of Jehovah had the right to have his children admitted to the local public or common school, without the obligation to receive religious instructions, Casey J. suggested a natural law basis for fundamental rights and freedoms and in particular freedom of religion and conscience. He said:¹⁷

What concerns us now is the denial of plaintiff's right of inviolability of conscience, a denial that is coupled with or effected by -- and in either case the result is the same -- active interference with his right to control the religious education of his children; and at this point I recall what is discussed at length by Mr. Justice Pratte, supra: plaintiff is obliged to send his children to school and he is entitled to send them to the particular one involved in this case.

It is well to remember that the rights of which we have been speaking find their source in natural law, those rules of action that evoke the notion of a justice which "human authority expresses, or ought to express, but does not make; a justice which human authority may fail to express, and must pay the penalty for failing to express by the diminution, or even the forfeiture, of its power to command", and of which it has been said:

But for natural law there would probably have been no American and no French revolution; nor would the great ideals of freedom and equality have found their way into the law-books after having found it into the hearts of men.

On this point there can be no doubt for if these rights find their source in positive law they can be taken away. But if, as they do, they find their existence in the very nature of man, then they cannot be taken away and they must prevail should they conflict with the provisions of positive law. Consequently if the regulations under which, rightly or wrongly, this school is being operated make it mandatory that non-Catholic pupils submit to the religious instructions and practices enacted by the Catholic Committee then these regulations are ultra vires the Committee, and invalid.

It is probable that this notion has less judicial future or potential scope as a basis for protection of fundamental rights and freedoms from both federal and provincial legislative interference than the one expressed by Abbott J. in the Padlock Act case. It calls to mind, however, the concept of "natural justice", which embodies certain procedural rights or guarantees established by the common law. In effect, this concept assures a fair and impersonal hearing to anyone whose rights are to be determined by administrative authority.¹⁸ It has never been suggested, however, that the right to a fair hearing cannot be denied by legislation, so that it cannot be said to be a right which finds any implied guarantee in the Canadian constitution, as in the case of those rights by means of which the parliamentary system functions. On the other hand, the judicial control of administrative action, which is an essential aspect of the Rule of Law, has been given, by judicial interpretation, what amounts to a constitutional guarantee. It is difficult to put any other construction upon the judicial refusal to give effect to legislative provisions purporting to exclude all judicial interference whatever with administrative action. In the face of plain and unqualified statutory language, the courts have held that they cannot ascribe to the legislature an intention to

deny that power of judicial review which is essential to the maintenance of a parliamentary legal order in which bodies exercising statutory authority are constrained to carry out the intention of Parliament by remaining within their respective jurisdictions.

It is necessary to consider now the effective protection which has been afforded to fundamental rights and freedoms by the Canadian Bill of Rights, a federal statute enacted in 1960.¹⁹ By its very nature and origin this statute cannot be considered to contain an "entrenched" Bill of Rights, since it is subject, like all other statutes, to repeal or amendment by the Parliament which enacted it, under the principle of parliamentary sovereignty. In its essential nature it must be regarded as nothing more than an interpretative act of a special character. Furthermore, it is generally assumed that it applies only to federal legislation.²⁰

It may be safely asserted that the Canadian Bill of Rights has had little practical significance in litigation since it was enacted in 1960.²¹ It is generally regarded by practising lawyers as a rather hopeless ground on which to attack a piece of federal legislation. It would appear that, in the view of the Courts, its application comes in conflict with the principle of parliamentary sovereignty, and they are for this reason most reluctant to give it practical effect, particularly in view of section 3 of the statute which contemplates that the Minister of Justice shall review all federal legislation to ascertain whether it comes in conflict with the rights and freedoms declared in sections 1 and 2. In other words, the Courts apparently take the attitude that Parliament must be presumed

to know what it is doing and to intend any departure from the Canadian Bill of Rights. It is true that the statute contemplates that, where Parliament intends to affect fundamental rights and freedoms declared therein, it will expressly declare that legislation is to operate "notwithstanding the Canadian Bill of Rights",²² but, in strict law, such a pretended limitation on the sovereignty of Parliament is without effect, and may be ignored or over-ridden by subsequent legislation, just as the Canadian Bill of Rights itself may be amended or repealed. As a matter of strict law, therefore, the Courts have no basis for recognizing in the statutory Bill of Rights a legal qualification of parliamentary sovereignty, and this presumably explains the fact that they have, on the whole, failed to give any practical effect to it.

The most serious judicial confrontation with the Canadian Bill of Rights has been the decision of the Supreme Court of Canada in Robertson and Rosettanni v. The Queen,²³ where the issue was whether the federal Lord's Day Act prohibiting certain activity on Sunday was in conflict with the Canadian Bill of Rights, which declares, among other things, that every law of Canada shall be so construed and applied as not to abrogate, abridge or infringe freedom of religion. The lower courts all held that there was no conflict with the Bill of Rights. This view was affirmed, with one dissenting voice, in the Supreme Court. The majority held, in effect, that the Lord's Day Act was not an interference with freedom of religion. In other words, the decision of the majority turned on the meaning to be ascribed to the words "freedom of religion" in the Bill of Rights. The judgment of the majority is, in effect, an affirmation that the Canadian legal order recognized certain fundamental rights and freedoms and gave them effective protection prior to the

enactment of the Bill of Rights, and that the Bill of Rights is simply a declaration of those rights and freedoms which existed at common law prior to its enactment. The majority opinion turned on the interpretation of the common law concept of "religious freedom" as enunciated in such previous decisions of the Court as Saumur v. City of Quebec and A-G Que.²⁴ The majority held that the effect of the prohibition in the Lord's Day Act on persons whose religion required them to observe a day of rest other than Sunday was a secular and financial rather than a religious one.

Cartwright J., dissenting, held that the Lord's Day Act was legislation in relation to religion; that its purpose and effect was "to compel, under the penal sanctions of the criminal law, the observance of Sunday as a religious holy day by all the inhabitants of Canada"; and that this was an infringement of religious freedom. He said:²⁵

In my opinion a law which compels a course of conduct, whether positive or negative, for a purely religious purpose, infringes the freedom of religion.

The dissent of Cartwright J. is also significant for its expression of opinion as to the effect of the Canadian Bill of Rights where there is a conflict between its provisions and those of other federal legislation. The opinion had been previously expressed by a Canadian Court of Appeal in Regina v. Gonzales²⁶ that if legislation enacted prior to the Bill of Rights could not be construed so as to avoid conflict with the provisions of the Bill of Rights then it must be held to prevail over the provisions of the latter. Cartwright J. expressed disagreement with this view, stating, "In my opinion whether there is irreconcilable conflict between another Act of Parliament and the Canadian Bill of Rights the latter must prevail."²⁷

As yet, however, we do not have a judgment of the Supreme Court of Canada giving effect to the Canadian Bill of Rights so as to invalidate or render inoperative other federal legislation, and few, if any, such judgments in lower Canadian courts.²⁸

The judgment of the Supreme Court in the Robertson and Rosetanni case is a reminder that the application of a Bill of Rights, whether statutory or entrenched, turns on judicial interpretation and gives to the courts a very great power to determine the content and practical implications of rights and freedoms which must necessarily be expressed in the broadest possible terms. It is to be seriously questioned whether such a Bill of Rights adds anything to the commonlaw principles and attitudes of statutory interpretation by which the courts have managed to avoid serious legislative curtailment of fundamental rights and freedoms, but it may, on the other hand, offer the courts an instrument or pretext for policy formation which is indistinguishable, for practical purposes, from legislative power. It is only necessary, in this regard, to recall the history of the "due process" clause in the American Constitution.²⁹

The experience of recent years has indicated that federal legislative jurisdiction with respect to criminal law affords a substantial, if not complete, safeguard against provincial legislative interference with fundamental rights and freedoms. If one adds to this concentration of legislative jurisdiction in this field, the restraining influence of a national public opinion, crystallized and expressed in the statutory Bill of Rights, it would appear that there is no pressing need to alter the fundamental nature of the Canadian Constitution by

the introduction of an entrenched Bill of Rights.³⁰ Moreover, such a Bill of Rights might well come in conflict with the notions of group and minority rights which are at the heart of the present controversy concerning the future of biculturalism in Canada. At the very least, it may be said that it is not easy to perceive the particular relevance of the notion of an entrenched Bill of Rights to the subject on which this Royal Commission must report, unless it be an aspect of the reaction of English-speaking Canadians to the demands being put forward by French Canada for a larger measure of cultural recognition and the practical implementation of such recognition by vocational and economic opportunity in daily life.

The important issue in the field of human rights in Canada today is not so much the danger of legislative and administrative interference with civil liberties because there is effective political and judicial recourse for this, but discrimination in the fields of employment, property transactions, public accommodation, admission to professional societies and voluntary associations and the like. This is a matter primarily, if not exclusively, for provincial legislative treatment as an aspect of property and civil rights. It is a matter to be dealt with, not by constitutional checks upon the validity of legislation, but by legislative initiative reaching private or non-official conduct in the economic and social relationships of daily life.³¹ There is already a certain amount of legislation in Canada against discrimination.³² This is a matter which may call ultimately for an administrative or investigative agency of a special character to carry out prompt and effective investigation of complaints, exercise a general and continuing review of the problem and contribute to public

information and education. It is a matter which should be given, as far as possible, a civil law rather than a criminal law treatment, and must, therefore, remain within the field of provincial responsibility.

This issue reminds us that legislative jurisdiction in the field of human rights is substantially divided in Canada between Parliament and the provincial legislatures. By virtue of its jurisdiction over the criminal law, Parliament has the principal control over the extent to which personal liberty may be restricted by positive prohibitions, but there is a very large field of prohibition open to the provinces by virtue of provincial jurisdiction to attach penal consequences to the violation of regulatory provisions in the field of property and civil rights. Then there is the broad range of provincial power to affect and, indeed, protect fundamental rights through civil responsibility or liability in damages. Take, for example, the right of free speech -- the qualification of this right is partly a matter of criminal liability and partly a matter of civil responsibility. It is Parliament which has the legislative jurisdiction to determine the limits of the right of free speech which are necessary for the security of the state and the maintenance of social order. In effect, the criminal law is, or ought to be, concerned with those limitations of free speech which are considered to be essential for the preservation of constitutional government and order. On the other hand, provincial law with respect to civil responsibility is concerned with reparation of the damage suffered by the individual as a result of an abuse of the right of free speech.

CHAPTER V. THE CRIMINAL LAW POWER AND PROVINCIAL AUTONOMY

1. The General Importance of the Criminal Law Power.

As a result of the narrow interpretation placed by the decisions of the Privy Council upon the "peace, order and good government" and "trade and commerce" clauses in section 91 of the B.N.A. Act, the criminal law power under section 91 (27)¹ became in many ways the most important general head of federal jurisdiction.

The relationship of the criminal law power to trade and commerce will be touched on in another chapter. We have already seen something of its role in the field of civil liberties. There can be no doubt that it is one of the most important heads of federal jurisdiction in its potential impact on provincial power.

At one time, there was a suggestion by the Privy Council that federal jurisdiction in this field was confined to what was inherently criminal,² but this notion was later repudiated.³ In effect, the criminal law is what Parliament says it is, and there is no limit to the power of Parliament to create new crimes, so long as its legislation in this field is bona fide and not a mere pretext or colourable basis for usurpation of provincial jurisdiction.⁴ No doubt the nature of the evil to which particular legislation is directed will be examined as an indice of whether the legislation has a general criminal law purpose or object,⁵ but with the evolution of social and economic conditions and the increasing complexity of modern life, Parliament is called upon, from time to time, to recognize new crimes, which may not have that readily recognizable character of

inherent evil. As the late Sir Lyman Duff said, the criminal law is "necessarily an expanding field".⁶ Accordingly, the scope of the criminal law power is such that it can extend the reach of federal legislative action into many important areas that would ordinarily fall under provincial jurisdiction.

It is intended, in this chapter, to comment on what appear to be two of the most important areas of potential conflict between the federal criminal law power and provincial autonomy. The first is the general area of moral values, involving such matters as drink,⁷ gambling,⁸ censorship,⁹ Sunday observance,¹⁰ and the like,¹¹ on which regional attitudes may vary; the second is the enforcement of provincial regulatory legislation by appropriate penal sanctions.

2. The Criminal Law Power and Provincial Attitudes on Moral Issues.

The first of these two areas of conflict raises a serious constitutional question as to whether an exclusive and unqualified jurisdiction over criminal law should be vested in a federal government, particularly in a bicultural state like Canada. As we have seen, some of the important civil liberties cases have arisen out of this area of conflict touching moral, religious and cultural values. The arguments for uniformity in the field of criminal law are obvious enough but the United States has got along without exclusive federal jurisdiction in this field, and it may be that some consideration should be given to the possibility of providing for a measure of concurrent jurisdiction over criminal law in Canada -- for permitting the provinces to "opt out" of certain criminal law provisions, or to

go beyond those which Parliament sees fit to enact -- so as to allow for free, popular expression of regional attitudes. The political importance of regional attitudes in Canada is nowhere more pronounced than in such matters as Sunday observance, censorship, gambling, and drinking, where value judgments reflect the wide range of moral, ethical, and religious outlook in the country.

The current issue of the right to conduct provincial lotteries points up the kind of frustration, and indeed exasperation, which can be generated when one set of regional moral values clashes with another and results in the inhibition of the only power in the field and the inability of one province to do something which it wishes to do without violence to the moral susceptibilities of other provinces.

The solution in such cases may be a right of provincial "opting out" recognized by the constitution. The Canada Temperance Act¹² and the Lord's Day Act¹³ are examples of federal legislation permitting local option. Should such a principle not be generalized and written into the Constitution for certain legislative purposes rather than being left to the political wisdom of Parliament?

It is in connection, however, with provincial legislation directed to the effective suppression of specific activities considered to be particularly offensive in a province that the strongest feelings are raised on the subject of provincial autonomy. Such legislative action generally arises out of a strong climate of public opinion in a province and may involve the very life of a provincial government. It often springs from deeply felt attitudes with strong religious and moral overtones. When the provinces are frustrated in attempts to

implement these values in valid legislation there is often a strong revulsion against the restraints imposed upon provincial action by the Constitution. The civil liberty cases which arose out of the activity of the Jehovah Witnesses left the Province of Quebec with a sense of grievance concerning not only the obstacles presented by the federal criminal law power, but the role of the Supreme Court itself as an arbiter of fundamental values in the field of personal freedom.¹⁴

The issue is whether the fundamental moral values of the country, in so far as these are expressed in law, should be left to the central or national legislature, or whether the nation may effectively pursue a broad national purpose while allowing for a variety of regional expression and evolution in the moral value judgments which constitute the heart and core of the cultural diversity that we may assume should be able to exist in a nation-state. Difference of language is important but so also are the differences of moral outlook and emphasis which are reflected in different cultures. It is these expressions of cultural difference, as much as language, which give rise to the sense of difference and even alienation and, where they are threatened, to a sense of outrage and of menace to the integrity of the individual conscience.

There is reason to believe that the dissatisfaction of the average French-Canadian with the Canadian Constitution and the effects of judicial interpretation of it is much more closely related to these areas, touching the individual conscience, than to any practical difficulties encountered in attempting to regulate the objective facts

of economic life. The present constitutional crisis, in so far as the man in the street is concerned, is essentially psychological in nature. It involves attitudes. This truth should not be overlooked merely because the more sophisticated minds in French Canada understand that these psychological difficulties are likely to be largely resolved by a more active and rewarding participation in decision-making in the country.

The introduction of a principle of local option or even concurrent provincial jurisdiction in criminal law (with defined limits for either federal or provincial jurisdiction) would involve the difficulty of defining in sufficiently broad terms those areas of policy which ought to be left to provincial choice. It would involve the classification of the criminal law into various categories of relative national importance. For example, the category of crimes against the state, including sedition, is one in which there obviously cannot be local option. So also with crimes relating to matters within specific heads of federal jurisdiction. There is, however, another category of crime which, while undoubtedly affecting the general welfare, may be said to be more a matter of individual morality or "local evil".¹⁵

This distinction was in fact urged in argument on behalf of the province of Quebec in the Padlock Act case, which involved the constitutional validity of provincial legislation directed to the suppression of communist activity in the province, when the official doctrine of the Roman Catholic Church was implacable in its hostility to communism as a philosophy and political activity. Concerning the

concept of the "local evil" as a constitutional basis for such provincial legislation, Rand J. said:¹⁶

It is then said that the ban is a local matter under head 16; that the social situation in Quebec is such that safeguarding its intellectual and spiritual life against subversive doctrines becomes a specific need in contrast with that for a general regulation by Parliament. A contention was made Re Section 6 of The Farm Security Act (1944) of Saskatchewan. What was dealt with there was the matter of interest on mortgages and a great deal of evidence to show the unique vicissitudes of farming in that Province was adduced. But there, as here, it was and is obvious that local conditions of that nature, assuming, for the purpose of the argument, their existence, cannot extend legislation to matters which lie outside of s.92.

It is also instructive to read what was said by Fauteux J.¹⁷ in this case concerning the constitutional possibility of treating certain criminal law questions as matters of a purely local or private nature within the meaning of section 92 (16) of the B.N.A. Act. He appears to conclude that since the criminal law relates, in the final analysis, to the security of the state as a whole, it can never in any of its aspects be regarded as a purely local or private matter within the province.

But is there any reason why the provinces should not be given legislative jurisdiction over those matters of public morality which do not really touch the security of the state? As matters stand now, there are almost no conceivable limits to the federal power to assume jurisdiction over matters which would ordinarily fall within the provincial private law domain of public policy, or what is called in the province of Quebec, "public order and good morals".

The courts have the power under our civil law system to determine when contracts and other civil law juridical acts shall be held null and void because they are immoral in their purpose or object. Why should the provincial legislatures not have the ultimate control over the prohibition, with penal consequences, of the acts to which the courts may attach such civil consequences. The terms in which the general objects of laws of a criminal character have been described by the courts indicate that the federal criminal law power overlaps the provincial domain of public order and good morals. In Russell v. The Queen¹⁸ the Privy Council referred to criminal laws in these terms:

... Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights.

In the Margarine case,¹⁹ Rand J. spoke of "public peace, order, security, health, morality" as being the "ordinary though not exclusive ends served by that law". Is there any reason why "morality" in the commonly accepted sense of the term, touching matters which affect the welfare and education of the young, such as drink, gambling, sexual behaviour, and censorship, should not be subject to ultimate provincial control?

The difficulty would be to define the federal power in terms that would be adequate for the over-all security of the state as well as the specific heads of federal jurisdiction. The problem, nevertheless, deserves further consideration because it tends to keep alive an irritating awareness of the religious differences which have prejudiced

inter-cultural relationships in Canada. It would be better if we did not have this conflict of moral values reflected in federal legislative initiative or inhibition, as the case may be.

There is no issue which raises this problem in a more serious form at the present time than the subject of censorship. There are two Quebec statutes which deal directly with this matter: the Publications and Public Morals Act²⁰ and the Moving Pictures Act,²¹ which establishes the Board of Cinema Censors.

The first of these statutes is directed against "immoral illustrations" in publications other than newspapers and those of a religious character. It requires that certain information be filed in the office of the Provincial Secretary for every publication in the province and provides for examination by the Board of Censors of any illustration submitted by the Attorney General, and an order by the Board, when it finds an illustration to be "immoral" within the meaning of the Act, having the effect of destroying all rights of ownership in the offending publication. An "immoral illustration" is defined in the Act as:

... any illustration, in the sense of the preceding paragraph, which evokes real or fictitious scenes of crime or of the habitual life of criminals, or morbid or obscene situations or attitudes, tending to corrupt youth and to pervert morals.

The Moving Pictures Act requires examination by the Board of Cinema Censors of "any films or other like devices which it is proposed to use in the Province for the purposes of exhibitions of moving pictures

by means of a cinematograph, moving-picture machine or other like means" The Board is constituted by the Act as "an organization for the supervising and censuring of moving pictures". The Act provides for fine, and failing payment, imprisonment, and for confiscation by the Provincial Police of any such film or device used without authorization of the Board. The Act is also concerned with preventing children under the age of sixteen from being admitted to film showings, with certain exceptions. A particularly interesting provision is the prohibition against open-air film performances except by special permission of the Provincial Secretary and when the performance is for a religious, educational or patriotic purpose.²² Violation of this provision is punishable by both fine and imprisonment.

The Moving Pictures Act also empowers the Lieutenant-Governor in Council to establish, under the control and direction of the Board of Censors, "a censorship of posters, signboards or other method of announcing a theatrical, a pictorial, or a moving picture performance". The Act further provides for censorship by the Board of newspaper advertising of moving pictures.

The constitutional validity or operative effect of these two statutes is obviously not free from doubt, particularly in view of certain dispositions of the Criminal Code of Canada touching similar matters. The issue, as in the slot machine cases, is whether the dominant aspect of the legislation is the use of property or the prohibition of certain conduct in the interests of public morality.

The question of obscenity was considered recently by the Supreme Court of Canada in the case of Brodie v. The Queen,²³ a case which involved the seizure and confiscation in the Province of Quebec under the provisions of the Criminal Code of Canada of copies of D. H. Lawrence's "Lady Chatterley's Lover". The Court held by a majority of five to four that the book was not an obscene publication.

It is impossible to overlook the fact that the minority was composed of judges of Roman Catholic religious persuasion. Nothing could demonstrate more forcibly that these matters of morality or ethics, finding their basis so often in religious or cultural convictions and attitudes, are better left to regional or local treatment if we wish to avoid repeated affront to the most deeply held feelings of personal loyalty and integrity. How can a nation feel satisfaction in determining such an issue on a five to four basis. The same is, of course, true of the Supreme Court decisions in the Saumur²⁴ and Boucher²⁵ cases which involved an appreciation of the limits of free speech in relationship to religious sensibility, and to a lesser extent in the Roncarelli²⁶ case, which was related to the same social facts: the sense of outrage produced by the provocative language of the Jehovah Witnesses.

The Brodie case turned on the application of the Criminal Code definition of "obscene" to Lawrence's book, and, in the realm of freedom of publication, it may be regarded as another example of the preservation or even enlargement of that freedom in Canada resulting from the commonlaw techniques of statutory interpretation and the power or discretion inherent in the judicial application of law to fact.

The issue in the Brodie case was whether Lawrence's book exhibited "undue" exploitation of sex as a dominant characteristic. The point of the case, for purposes of the issue being considered in this chapter, is that nine judges of the Supreme Court of Canada could have divided so evenly as to whether there was such undue exploitation of sex in the work. The question is so obviously a matter of taste and instinctive, almost sub-conscious, response that it is extremely difficult to understand how one can seriously claim any validity for a treatment and final determination of it on such a narrow division of opinion. It may be said that provincial legislative treatment of such problems would not remove the difficulties of interpretation and appreciation inherent in the judicial function, and this is true, but the direction and emphasis of legislative concern with such problems would then be more likely to reflect the provincial ethos than they do when they must find the lowest common denominator -- increasingly an American denominator --- at the federal level.

The Brodie case raised no constitutional issue, but it involved the highly subjective appreciation of whether there was undue exploitation of sex as a dominant characteristic in what was obviously a literary work of art. An underlying issue was whether this question was to be decided according to the opinion of the expert -- that is, the critic or other literary authority whose concern for art necessarily disposes him to a liberal view of artistic license in the treatment of sex, -- or by the man with no particular claim to literary expertise and necessarily reflecting the notions or prejudices of conventional morality but approaching the issue as a bon père de famille mindful especially of

the welfare of young people. The issue is expressed in this manner, not to reveal the author's own bias, but to emphasize the kind of dissatisfaction produced by the decision of these matters remote from local attitudes and feelings. It is only too easy in such cases to put the experience down to lack of understanding between cultural or linguistic groups. How can we fail to be disturbed when a judge as respected and as knowledgeable in criminal law matters as Mr. Justice Fauteux feels obliged to express his dissent in the following terms:²⁷

This edition of the book contains no less than fifteen pornographic and adulterous episodes which decency has always forbidden ministerial or judicial officers to recite textually in the written opinion they gave as to its character. This edition is accurately described in the following excerpt from the interdiction pronounced in respect thereto by the United States Postmaster-General:

The book is replete with descriptions in minute detail of sexual acts engaged in or discussed by the book's principal characters. These descriptions utilize filthy, offensive and degrading words and terms. Any literary merit the book may have is far outweighed by the pornographic and smutty passages and words, so that the book, taken as a whole, is an obscene and filthy work.

And as to whether the issue is to be left to determination by literary experts, he wryly observed:²⁸

Whatever be the outstanding position held by Lawrence as a writer, this book offers no evidence that an expert in literature necessarily qualifies, for that reason, as a custos mores.

It is noteworthy that Judson J., with whom Cartwright, Abbott, and Martland JJ. concurred, expresses the opinion that the "standards



of the community" should be the test of what is "undue" in the exploitation of sex as a dominant characteristic.²⁹ But the issue in Canada is: "What community?" Ritchie J., who was the other judge making up the majority, similarly referred to the "existing standards of decency in the community" as the test of what is "undue".³⁰ The opinion of Ritchie J. is conspicuous for its candour as to the essential nature of the responsibility placed upon a judge in such a case:³¹

Under s.150A the burden of deciding whether the publication is likely to corrupt a significant segment of the population and the burden of determining what is or what is not 'undue' so as to offend community standards is placed upon the judge before whom the publication is brought, and while it is true that his decision in either case must be a subjective one and will of necessity be coloured in some degree by his own predispositions on such questions, this is not a unique position for a judge under our system of law, and under the Criminal Code it is he and he alone who must be 'satisfied that the publication is obscene ...' if it is to be forfeited. It should be remembered, however, that these sections of the Criminal Code are enacted for the protection of the public and obscenity i. not to be determined by the act that a publication may offend the prude or excite the frustrated; it must be offensive to the community standards or be likely to deprave or corrupt a recognizable segment of the public.

Once again, we may ask: what, in the context of Canadian federalism, is "a recognizable segment of the public"? Both the Superior Court and the Quebec Court of Appeal ruled against "Lady Chatterley's Lover". If one counts the judges in all of the courts, there were more in favour of a finding of obscenity than opposed to it.

The limitations imposed at the present time by federal jurisdiction in this field are well expressed by Mr. Justice Casey in the provincial Court of Appeal in this case. He said:³²

But we must not forget that the voice of Parliament is the voice of the Canadian people. In criminal matters Parliament does not speak for groups nor do the standards that it sets up vary with the areas in which they are applied. It speaks for all the people and because of this, because of the differences of opinion that exist and that must be respected, one must assume as has been stated elsewhere, that "the moral aspirations of the law are minimal".

At one time there appeared to be the possibility in the field of public morality of the kind of working concurrence or co-existence of federal and provincial legislation that has been permitted in relation to other matters which are the object of treatment by both federal criminal law and provincial regulatory legislation. This seemed to be the necessary result of the scope given to provincial legislative jurisdiction in relation to "property rights" in the case of Bédard v. Dawson.³³ The unanimous decision of the Supreme Court of Canada in that case, upholding the validity of provincial legislation authorizing a judge to order the closing of a disorderly house, upon proof of conviction under the Criminal Code that the property had been used as such, is the basis upon which much subsequent provincial legislation touching the domain of public morality has been erected.

In Johnson v. Attorney-General of Alberta³⁴ the Supreme Court of Canada had occasion to reconsider the implications of Bédard v. Dawson in connection with provincial legislation directed against slot machines. The legislation was so framed as to emphasize regulation of the right of property in slot machines, but the Supreme Court, by a majority of four to three, held it to be ultra vires as legislation in relation to criminal law. The legislation provided that there could be no right of ownership or enforceable property rights in a slot machine

in the province and further provided for seizure and confiscation, upon a judicial finding that a machine was a slot machine within the meaning of the Act. The constitutional issue, as framed by the Court, was whether the pith and substance of the legislation was to prohibit a certain form of gambling, with penal consequences, or whether the legislation was directed, not to the creation of an offense, but to prevention of the use of certain property. Here the Supreme Court had an opportunity, by adopting a strict view of the formal or technical nature of criminal law legislation, to permit a degree of concurrent provincial regulation or suppression, through control of the use of property, of activity in the domain of public morality. The dissenting judges emphasized the fact that the legislation did not create an offense for which a person could be convicted and punished but was directed to the ownership and use of property. The majority took the view, however, that notwithstanding the form in which the legislation was expressed, its purpose was to suppress a certain form of gambling, which was a matter within the exclusive jurisdiction of Parliament. It was undoubtedly an important consideration in this case that Parliament had legislated under the Criminal Code with respect to slot machines and had also provided for their confiscation, and the narrowness of the division in the Court is shown by the fact that Rand J., who voted with the majority, was satisfied to rest his opinion on conflict between the federal and provincial provisions, rendering the latter inoperative. His analysis of the problem, however, leaves little doubt that had it been necessary, he would have concluded that the provincial legislation was invalid, even in the absence of a Criminal Code provision, as an invasion of the exclusive federal jurisdiction over criminal law. This is implicit in his characterization

of the provincial legislation as "aimed primarily at the evil of gambling". In a word, the majority regarded the provincial legislation as creating an effective prohibition and penalty of a criminal law character.

The majority view with respect to the implications of Bédard v. Dawson was further consolidated by the decision in the Padlock Act case where Kerwin C.J. said:³⁵

The decision of this Court in Bédard v. Dawson et al is clearly distinguishable. As Mr. Justice Barclay points out, the real object of the Act under consideration is to prevent propagation of communism in the Province and to punish anyone who does so -- with provisions authorizing steps for the closing of premises used for such object. The Bédard case was concerned with the control and enjoyment of property.

What the subsequent judicial commentary on Bédard v. Dawson points up is that provincial penal jurisdiction is only to be exercised as an accessory power, related to a legislative purpose of a clearly provincial nature. Provincial jurisdiction in relation to property rights has been rejected by the Court as too broad or vague a purpose to support the validity of legislation having essentially a penal character, at least where the conduct or conditions which it seeks to suppress would be appropriate for criminal law treatment by Parliament. The provincial criminal law power (as it has sometimes been referred to), in virtue of section 92 (15), is very clearly on its face an accessory or subsidiary power for the enforcement of provincial legislation based on some other head of jurisdiction. This is in effect what distinguishes the federal and provincial penal jurisdictions: the provincial jurisdiction does not, like the federal, extend to the enactment of legislation the sole object of which is the creation of

an offense. To support provincial penal provisions there must be some purpose or object to the legislation other than prohibition. This leads us to a consideration of the degree of concurrency or co-existence with federal criminal law which has been permitted by the judicial decisions for provincial penal provisions having this accessory or subsidiary character.

3. The Enforcement of Provincial Regulatory Legislation by Appropriate Penal Sanctions.

The issue here has not been, as in the field of public morality, whether a legislative provision is in pith and substance a prohibition with penal consequences because the provisions are quite clearly expressed in this form, but whether there is conflict between federal and provincial provisions contemplating essentially the same fact situation so as to render the provincial legislation inoperative. Here the courts have indicated that they are prepared to go very far, where they find a valid provincial purpose outside the terms of section 92 (15) of the B.N.A. Act, to permit the co-existence of federal and provincial provisions, even where it would appear that the provincial provision is substantially a duplication of the federal one. The development of this approach is to be traced through a series of decisions in recent years³⁶ stemming from the judgment of the Supreme Court in Provincial Secretary of Prince Edward Island v. Egan³⁷ which upheld the validity of provincial legislation providing for the suspension of a driving license upon a conviction, under the Criminal Code of Canada, for driving while under the influence of intoxicating liquor or drugs. The Criminal Code also provided for suspension of the right

to drive, so that the issue of conflict was whether the provincial legislation provided an additional penalty for a criminal offense. The Court held that the provincial legislation related to the conditions of the right to a driving license, a matter within the unquestioned authority of the provincial legislature to regulate highway traffic within the province. Since the operation of the provincial legislation in issue in this case turned once again upon proof of conviction under the Criminal Code of Canada, the Court was clearly able to rely on Bédard v. Dawson in applying the distinction made in that case between the imposition of an additional penalty and the provision of a civil disability as a result of a criminal conviction.

It is important to observe the stress that was laid by Rinfret J. in the Egan case on the finding that the federal and provincial provisions were not co-extensive. This implied the assumption that had they been co-extensive the rule of paramountcy would have had to operate to suspend the provincial enactment even though it had what would otherwise have been a valid provincial aspect as a condition attaching to a right to provincial driving license. It is, however, this assumption which has been re-examined and seriously shaken by subsequent decisions of the Supreme Court involving federal and provincial legislation so similar as, at times, to strain ingenuity in trying to find a substantial difference. The process and underlying trend of the Court's decisions, in relation to this problem, emerge most strikingly in the case of Smith v. The Queen,³⁸ where the issue was whether there was conflict or repugnancy between federal and provincial legislation in relation to fraud in the sale of

corporate securities. There was no question, on the authority of the judgment of the Privy Council in Lymburn v. Mayland,³⁹ that the provincial legislature had jurisdiction to enact legislation in relation to securities frauds prevention, but by the same token there could be no doubt about the validity of the provisions of the Criminal Code of Canada which were directed to the punishment of certain kinds of conduct in this field. Once again, the Court treated the issue as whether or not there was a difference between the two legislative provisions, but the difference was in fact so slight that one cannot escape the conclusion that the issue turned, in the final analysis, on the Court's view of what must be considered to be conflict or repugnancy rendering provincial legislation inoperative.

Although, like other members who made up the majority, Martland J. professed to find a difference in the two legislative provisions, he suggested how far he would be prepared to go in permitting the co-existence of essentially identical provisions when, acknowledging that the provisions in issue might to some extent "overlap", he said:⁴⁰

However, even in such cases there is no conflict in the sense that compliance with one law involves breach of the other.

It is suggested that this limited view of conflict or repugnancy is the as yet inarticulated view of the majority of the Supreme Court because it is only on this view that one can understand the Court's decision in the Smith case. It is the only view that will give effective scope to provincial regulatory jurisdiction. The issue is

whether the provincial legislatures are to be prevented from attaching penal consequences to a broad range of conduct simply because some portions or elements of that conduct may fall under a Criminal Code provision. It would be practically impossible for the provinces to deal only with such conduct as does not fall within the provisions of the Criminal Code since their penal legislation is directed to the enforcement of broad regulatory schemes and must necessarily be comprehensive in character. Indeed, serious doubt has been cast upon the validity of a general penal provision directed in its terms to all spheres of a particular kind of conduct except those regulated by the Criminal Code.⁴¹ The test formulated by Mr. Justice Martland in the Smith case would make possible the concurrent operation or co-existence of identical legislative provisions, so long as the provincial provision is accessory or incidental to a valid provincial legislative purpose and does not nullify or negate the federal provision. The Court appears to be prepared to accept the fact that the avoidance, in such circumstances, of double liability must be left to administrative discretion.

This is the outstanding example in recent years of the contribution of judicial review to the maintenance of an effective equilibrium in the distribution of legislative jurisdiction between the federal and provincial governments. As a result of these decisions, the federal criminal law power would not appear to create any serious practical problem for provincial regulatory jurisdiction. The chief remaining issue is whether there should be an amendment to the Constitution to give the provinces a concurrent, if not exclusive, jurisdiction with respect to certain matters in the field of public morality that are

clearly related to cultural values such as, for example, censorship
and the observance of religious feast days.⁴²



CHAPTER VI. CONTROL OF NATURAL RESOURCES

A more effective control and utilization of the natural resources within its territorial jurisdiction is a primary policy objective of the Quebec government. The control of natural resources is a complex subject requiring some general definition of its purpose before any attempt is made to analyze its constituent elements. In terms of provincial economic policy, such control has for its principal object the assurance that the province will derive the maximum benefit in the forms of public revenue, employment and wages, and the development of secondary industry, from the exploitation of its natural resources. Such control is effectively exercised through ownership of the resources and the legislative power to regulate various aspects of their exploitation.

The regulatory power inherent in the right of property is an important instrument for implementing provincial policy with respect to natural resources, and it is for this reason that the provincial government is at the present time so jealous of its property rights and of what is generally referred to as the "territorial integrity" of the province. The right of property enables one to impose conditions upon its use, both financial and functional, irrespective of legislative jurisdiction.

At Confederation, public property in Canada was distributed between the federal and provincial governments by the terms of the British North America Act.¹ Provincial ownership was the general rule, federal ownership the exception.² The Courts have emphasized

that legislative jurisdiction must not be confused with proprietary rights and interests and must not be used indirectly to disturb the property distribution which was made by the B.N.A. Act.³ They have also been obliged to observe, however, that legislative jurisdiction may necessarily and incidentally affect proprietary rights, including those of the Crown in right of a province, and may even go so far in its legitimate exercise as to render such rights commercially valueless.⁴

The most serious question, however, that arises in connection with provincial concern with proprietary rights and the territorial integrity of the province is the potential scope of the federal power of expropriation. The only explicit reference to expropriation in the B.N.A. Act is in section 117 which gives the federal government the right to expropriate or requisition property for the defence of Canada.⁵ There is no reference in section 91 to federal legislative jurisdiction with respect to expropriation. It cannot be said that the judicial decisions yield a clear indication of the nature and extent of such legislative jurisdiction. It has been held that the right to authorize expropriation of property (including provincial lands) required for interprovincial or federal railways is of the very essence of the legislative jurisdiction with respect to such undertakings.⁶ On the other hand, it has been held that federal jurisdiction with respect to Indians and lands reserved for the Indians does not include the power to authorize the expropriation of Indian reserves, the underlying title to which remains vested in the province.⁷ Thus, as indicated above, legislative jurisdiction with respect to a specific property does not necessarily involve the right to authorize the



forceable acquisition of the ownership of such property. The criteria for determining whether a particular head of jurisdiction carries with it, in relation to specific legislative purposes, a power of expropriation have not been clearly laid down by the Courts, but it may be fairly said that from such judicial authority as does exist,⁸ there emerges the clear suggestion of two eminently reasonable principles: first, that there cannot be an unlimited federal power of expropriation since this can do extreme violence, not only to the fundamental distribution of public property established by the B.N.A. Act, but also to the effective distribution of legislative power; and secondly, that the federal power to authorize expropriation should be conceded only where it is necessary to the effective exercise of federal legislative jurisdiction. There remains the fact, however, that there is presently on the statute books of Canada a long list of statutes⁹ authorizing expropriation for a variety of federal purposes and heading the list is an Expropriation Act,¹⁰ which, on its face, purports to give the federal government the power to expropriate for purposes entirely within its discretion. The constitutional validity of this Act has not yet been ruled on by the Supreme Court of Canada, and there is a serious question as to its validity in its present unlimited scope. In any event, it is a political fact that the government of Quebec cannot accept, as a constitutional premise, an unlimited power of federal expropriation, with or without compensation.

Quebec's concern with the territorial integrity of the province is directed to both the financial and regulatory aspects of provincial jurisdiction. The effective autonomy of the province is seriously qualified by the presence of numerous enclaves of federal property or property over which the federal government has, by judicial interpretation,



been given such far-reaching legislative jurisdiction as to exclude provincial jurisdiction for all practical purposes. Such, for example, is the case of interprovincial works and undertakings, which are the subject of a separate chapter. Whatever be the political reality or potential danger of the separatist outlook, it does not serve any useful purpose at this time to increase the provincial sense of vulnerability to the forceable intrusion of federal power and territorial control with all that this does to undermine the sense of being "maître chez nous". If a reasonable definition is not to be given, by judicial interpretation, to the basis and scope of the federal power to authorize expropriation, then it is suggested that serious consideration must be given to an amendment to the Canadian Constitution to define such power in terms which may be reasonably accepted by the province of Quebec. This is not the place to suggest such terms but merely to draw attention to the issue, which is one of considerable concern at the present time and which aggravates federal-provincial relations. We are talking here about the concern of a people to maintain their control over the land which constitutes their hearth and the foundation of their national development.

Another federal power which must necessarily be considered in connection with provincial control over natural resources is the power of Parliament, in virtue of sections 92 (10) (c)¹¹ and 91 (29)¹² of the B.N.A. Act, to assume exclusive legislative jurisdiction with respect to a "work" wholly situated within a province by the simple declaration that it is for the general advantage of Canada or for the advantage of two or more provinces. The necessity, expediency or propriety of such a declaration, in any particular case, is not

reviewable by the Courts,¹³ so that on its face the power is an unlimited one for the unilateral expansion of federal legislative jurisdiction.

It represents a substantial reserve of federal control over the provinces, making it possible for the federal government to remove particular facilities or developments substantially from the reach of provincial jurisdiction. Of this power, the late Sir Lyman Duff observed:¹⁴

The authority created by s. 92 (10c) is of a most unusual nature. It is an authority given to the Dominion Parliament to clothe itself with jurisdiction -- exclusive jurisdiction -- in respect of subjects over which, in the absence of such action by Parliament, exclusive control is, and would remain vested in the provinces. Parliament is empowered to withdraw from that control matters coming within such subjects, and to assume jurisdiction itself. It wields an authority which enables it, in effect, to rearrange the distribution of legislative powers effected directly by the Act, and, in some views of the enactment, to bring about changes of the most radical import, in that distribution; and the basis and condition of its action must be the decision by Parliament that the "work or undertaking" or class of works or undertakings affected by that action is "for the general advantage of Canada," or of two or more of the provinces; which decision must be evidenced and authenticated by a solemn declaration, in that sense, by Parliament itself.

The only conceivable limit on this power is that which results from the definition of the word "works", but it cannot be said that the courts have as yet given any clear indication of the meaning to be attributed to this term or that they are disposed to impose any limit on the power of Parliament through the definition of this term, short, we may presume, of a clear case of a colourable exercise of the power.¹⁵

In one judgment of the Supreme Court¹⁶ a majority held a declaration under 92 (10) (c) to be invalid on the ground that it

related generally to works to be executed after the declaration, but there was a strong dissent in the same case in favour of the validity of such a declaration so long as the class of future works was sufficiently described for identification. Viewed as a whole, the case law concerning this power affords little ground for believing that the courts can impose any significant or effective limitation upon its exercise. For this reason, it is a serious source of constitutional uncertainty and, together with the federal power of expropriation, one of the chief causes of a sense of constitutional insecurity in the province of Quebec. It is, therefore, recommended that this power be abolished. The alternative would be to specify, in the Constitution, acceptable criteria for its exercise which could be the subject of judicial review.

The precise inter-relation of federal and provincial proprietary rights and legislative jurisdiction bearing more or less directly on the subject of natural resources is somewhat complex, and in places obscure, but in the result, it would seem that there are few, if any, practical impediments to effective provincial control. The fundamental basis of provincial control is the ownership of the land and all the incidents of such ownership, including natural products, timber, minerals, fisheries, and water power. The only proprietary right relating to the subject of natural resources which was expressly conferred upon the federal government by the B.N.A. Act is the first item in the Third Schedule of the Act, "L. Canals, with Lands and Water Power connected therewith". The balance of proprietary rights with respect to natural resources

are vested in the province by sections 109 and 117. The implications of the federal proprietary rights in respect of certain water power were the subject of a reference to the Supreme Court which resulted in little illumination of the problem,¹⁷ but it cannot be said, as a practical matter, that these rights, whatever they be, have presented any serious obstacle to provincial development and regulation of water power. The federal legislative jurisdiction having the most direct connection with the subject of water power is that with respect to navigation and shipping under section 91 (10)¹⁸ of the B.N.A. Act. The consent of the federal government is required for any works which interfere with navigation.¹⁹

The forest resources of the province are fully under provincial legislative and administrative control by virtue of section 92 (5):

"The management and sale of the public lands belonging to the province and of the timber and wood thereon". The effective regulation of the exploitation of forest resources is, however, a more complicated matter than the development of hydro-electric power, which is now carried out almost exclusively by a Crown corporation. Two major issues today concerning the exploitation of the forest, which is the basis of the province's most important industry, are the insistence that forest products be processed as fully as possible within the province so as to create the maximum employment and provincial revenue, and the use of forest resources to diversify and strengthen regional economies, particularly in agricultural areas. These objectives necessarily involve the province in the regulation of trade and commerce with important inter-provincial and international implications. What, for example,

is the constitutional basis of a provincial prohibition against the exportation of forest products, such as pulpwood or pulp, which have not gone through the fullest possible processing, or the requirement that pulp and paper manufacturers shall purchase annually certain quantities of their wood requirements from small producers at prices to be fixed (failing agreement) by a marketing board?²⁰ These are questions which fall within the subject of "The Regulation of Trade and Commerce", which is considered in a separate chapter, but it is sufficient to emphasize here that, so long as the exploitation of natural resources requires a permit or license from the government, because of the government's right of ownership, a great deal can be done in the way of effective regulation which does not encounter issues of divided legislative jurisdiction, merely by imposing certain requirements as conditions of such a permit or license. This is the area of what may be called "executive", as distinct from "legislative", power and underlies the distribution of legislative jurisdiction in the B.N.A. Act as a sub-stratum in which important shifts can have profound effects on the effective constitutional power of the two co-ordinate levels of government.

What has been said about provincial control and regulation of the exploitation of forest resources applies substantially to the mineral resources of the province. The forestry and mining departments of the federal government have, in so far as the provinces are concerned, no regulatory jurisdiction, although they may render important assistance and co-operation to the provincial administrations, as for example, with respect to geological surveys.

On the other hand, we must never forget that the development of natural resources depends not merely on the grant of licences and the control of physical aspects of such development by the province, but may be profoundly influenced by fiscal legislation of the federal government which may determine not only the basic decision to undertake a particular resource development, but the regional location of a particular development. This observation is made here in order to emphasize that, while it may be convenient for purposes of discussion and analysis to treat various areas of jurisdiction separately, they are all closely related, and it is impossible to understand the present constitutional demands of Quebec unless one keeps constantly in mind the intimate relationship between regulatory jurisdiction and fiscal power. Thus, the great issue with respect to natural resources is not the absence of regulatory power which appears, on the whole, to leave little to be desired, but a larger measure of fiscal power so as to be able to influence the direction of investment and development in this field.

In so far as the other natural resources are concerned, the chief points to be noted are the concurrent jurisdiction with respect to agriculture²¹ and the apparently complete federal jurisdiction with respect to fisheries.²² Neither of these appears to have presented any practical administrative problem for the province. Concurrency with respect to agriculture does not appear to have raised any serious problems in the field of federal/provincial relations, perhaps because of the narrow construction given to this

jurisdiction by the courts.²³ The problems have arisen, rather, in connection with the marketing of agricultural products, which has been treated as an aspect of trade and commerce rather than of agriculture.

The exclusive federal jurisdiction in relation to "sea coast and inland fisheries" under section 91 (12) is an anomaly, and indeed, belies the actual facts since, by agreement, the administration of fisheries has been left in varying degrees to provincial departments,²⁴ and the regulations made by the federal government evidence that the proper treatment of fisheries is very much a regional or local matter. It may be expected, therefore, that there would be no serious objection, in any general constitutional revision, to recognizing provincial jurisdiction in connection with intra-provincial fisheries. There would remain, however, the delicate question of coastal fisheries which can involve the international relations of the country.

Here we are on ground similar to that of the dispute concerning off-shore mineral rights. It would not be appropriate here to enter into a discussion of this question, but it is sufficient to emphasize that in approaching questions of this character we must keep in mind three distinct aspects of the problem: proprietary rights, legislative jurisdiction, and international personality and relations. The Quebec government has already indicated that it considers these are matters to be settled by inter-governmental negotiation rather than judicial decision. Its attitude, in this regard, may be better understood

if one refers to the judicial decisions in connection with fisheries.

In addition to emphasizing the fundamental distinction between proprietary rights and legislative jurisdiction, which has made federal and provincial co-operation essential in this field, the courts declined to pronounce upon proprietary rights in the bed of the sea within the territorial limit on the ground that the question is one which involves international relations.²⁵ In a Quebec case,²⁶ which raised questions as to the rights of the provincial government in respect of fisheries in tidal waters, including the three-mile territorial limit, Viscount Haldane, delivering the judgment of the Privy Council, said:

The Chief Justice, following their Lordships' view, expressed in the British Columbia case, declined to answer so much of any of the questions raised as related to the three-mile limit. As to this, their Lordships agree with him. It is highly inexpedient, in a controversy of a purely municipal character such as the present, to express an opinion on what is really a question of public international law. If their Lordships thought it proper to entertain such a question they would have directed the Home Government to be notified, in as much as the point is one which affects the Empire as a whole.

CHAPTER VII. THE REGULATION OF THE CORPORATION

1. Importance of Such Regulation.

The business corporation is the most powerful and influential non-governmental institution in modern society. Its regulation is accordingly a primary responsibility of government. In its concentration and effective exercise of power it is often a rival to government. The aggregate of individual corporate decisions -- not always so unco-ordinated as the theory of free enterprise presupposes -- is more determinative of the allocation of physical and human resources than those of government itself. Corporate business is a generator; government is a regulator. The basic decisions in the fields of investment and economic expansion are made by our large financial institutions and business corporations. The corporation also exercises a pervading influence in many other spheres of life including the creation of wants and the formation of fundamental attitudes and values. The corporation absorbs so much of the working and social energy of human beings on this continent today that it must be considered to be the primary formative influence on their lives. Its continuous drive in the direction of more complex organization and technological innovation determines relative values in the field of education and orders the priorities according to which the human resources of the country are allocated to different tasks.

The corporation is a creature of law. It is a legal fiction which can exist only by government fiat. Its primary and

distinguishing characteristic is that it permits a group of individuals to carry on a business enterprise while limiting their liability or potential loss to the amount which they invest in it. This characteristic necessitates government regulation of the corporation in order to protect creditors. The corporation is also a device by which a business enterprise may acquire capital by the sale of corporate securities. This power must also be regulated by government for the protection of those who purchase such securities. These matters deal with the constitution, financial structure, control and operation of the corporation. But effective government regulation of the corporation today extends to a wide range of other matters including taxation, local licensing regulations, zoning, building, safety, and sanitation regulations, labour regulations, and marketing regulations. Some of these matters will be given more detailed analysis in separate chapters, but it is proposed to consider here the broad lines of the division of legislative and executive power respecting the creation of corporations, and their management as legal organizations, as well as the extent to which exclusive federal or provincial control over these matters limits effective regulation of them in other fields.

2. Distribution of Legislative Jurisdiction in Respect of the Incorporation of Companies.

Legislative jurisdiction with respect to the incorporation of companies includes not only the power to create corporate entities and to endow them with certain capacity and powers but also to regulate the manner in which their powers shall be

controlled and exercised. This is, broadly speaking, what we mean by "company law". The federal and provincial legislatures have an overlapping jurisdiction in this field.

Provincial legislative jurisdiction with respect to the incorporation of companies is restricted by s.92 (11) to "The Incorporation of Companies with Provincial Objects". The jurisdiction with respect to the incorporation of companies with dominion objects lies with the federal government as a residual power under the peace, order and good government clause.¹ In fact, this power permits the federal government to incorporate companies with avowedly country-wide purposes, but with business confined in fact to a single province. For practical purposes, the federal power of incorporation is unqualified.

These are the broad lines of the distribution of legislative power with respect to companies, but the incorporation of certain companies of a special character is reserved either to Parliament or the provincial legislatures by specific heads of jurisdiction. The incorporation of commercial banks and savings banks falls under federal jurisdiction by virtue of heads 15 and 16 of s.92 of the B.N.A. Act. The constitution and regulation of municipal and school corporations falls under provincial jurisdiction by virtue of s.92 (8) and s.93. There is also the exclusive federal jurisdiction to incorporate companies with the power to operate interprovincial works or undertakings, or works declared to be for the general advantage of Canada under s.92 (10). This special head of jurisdiction, which is a large and important

fields of federal control, will be considered in another chapter. Since the principal purpose of this chapter is to consider the effective limitations imposed by the present constitution upon provincial power to control the corporation, it is necessary first to examine the limitations created by the wording of s.92 (11).

3. The Limitations on Provincial Jurisdiction with Respect to Incorporation of Companies.

The issue which arises here is whether there should be any limitation upon provincial legislative jurisdiction to incorporate companies or whether it should be fully concurrent with the jurisdiction of Parliament. It would not appear that the limitations imposed by the terms of s.92 (11) of the B.N.A. Act have created serious practical difficulties for companies incorporated by provincial charter. According to the judicial decisions, the provincial legislatures are not competent to confer extra-provincial powers upon companies incorporated under provincial laws but the terms of s.92 (11) do not prevent the creation, by exercise of the Royal prerogative in the province, of companies having the capacity to receive such powers from competent governmental authority.² Thus, in practice, provincially incorporated companies are capable of acquiring the right to carry on business in any province of Canada by conforming to the laws affecting registration in each province.

As to whether provincial jurisdiction should, as a matter of principle, be so limited, the issue is not simply the respective powers of the federal and provincial governments but the powers of

the provincial governments as between themselves to control corporate operations within their respective territories. If all the provinces had the power to confer upon companies incorporated by them the right to carry on business anywhere in Canada, then no province would have the power to restrict or regulate the right of a company incorporated anywhere in Canada to carry on business within its own territorial limits. How important, from a practical point of view, is this provincial right to regulate the power to carry on business within the province? It is already seriously qualified by the federal power to incorporate companies with the right to carry on business throughout Canada. As regards other companies, it is largely a matter of provincial revenue, but the question can only be fully answered by consideration of the extent to which the province has power to regulate companies incorporated under some other jurisdiction. The answer to this question is to be found in a series of decisions dealing with the status of dominion and foreign companies.

4. Provincial Legislative Power to Affect Federally Incorporated Companies.

We are considering here provincial legislative jurisdiction with respect to companies incorporated by federal charter under the residuary power and not jurisdiction with respect to companies incorporated by virtue of specific heads of federal jurisdiction such as those governing interprovincial works and undertakings, banks, and navigation and shipping, where federal jurisdiction extends considerably beyond matters of incorporation

and constitutional regulation of the company. In general terms, the courts have held that companies incorporated by federal charter in virtue of the residuary power are subject to provincial laws of general application, but that such laws may not substantially impair the status and powers of such companies. The cases have acknowledged the validity, as applied to such federally incorporated companies, of provincial laws respecting mortmain licenses, the imposition of direct taxation, including the requirement of a license to trade, as a method of raising revenue, and the regulation of contracts within the province.³ In one case, the Privy Council held that provincial legislation, including penalties for its enforcement, could not be so directed as "indirectly to sterilize or even to affect, if the local laws were not obeyed, the description of the capacities and powers which the Dominion had validly conferred;"⁴ in a subsequent case, it was held that "it is not competent to the legislatures of those Provinces so to legislate as to impair the status and essential capacities of the company in a substantial degree."⁵ A distinction emerges from the cases between provincial legislation which merely imposes a fine for violation of a registration or licensing requirement directed to a valid provincial purpose, such as the raising of revenue by direct taxation or the obtaining of information, and provincial legislation which prohibits a federally incorporated company from carrying on business unless and until such requirement has been fulfilled. In effect, anything which interferes with the right of a federally incorporated company to carry on business in a province will be considered to be a substantial

impairment of its status and powers, within the meaning of the rule laid down in the cases.

In one case, the Privy Council held that provincial interference with the capacity of a federally incorporated company to obtain capital impaired its status and powers in a manner more direct and serious than the other kinds of provincial legislation which had been conceded to be valid, as applied to such companies, and to which allusion was made in the following passage from the judgment:⁶

This is not a mere case of fixing the conditions of local trade or of regulating the form or the formalities of the contracts, under which business is to be carried on within the Province, or of prescribing the restrictions under which property within the Province can be acquired, nor is it a mere matter of local police regulations, or local administration, or raising of local revenue, or a mere means of attaining some exclusively Provincial object. The capacity of a Dominion company to obtain capital by the subscription, or so called sale, of its shares, is essential in a sense, in which holding particular kinds of property in a Province or selling particular commodities, subject to Provincial conditions or regulations, is not. Neither is the legislation which is in question saved by the fact, that all kinds of companies are aimed at and that there is no special discrimination against Dominion companies. The matter depends upon the effect of the legislation not upon its purpose.

The result of this decision might well appear to be that a province cannot regulate the sale of securities by a federally incorporated company, but in Lymburn v. Mayland⁷ the Privy Council upheld the validity of a provincial Securities Frauds Prevention Act as applied to such companies, on the ground that the Act did not wholly preclude such companies from selling their shares unless registered, but merely subjected them to the provisions applying to all persons trading in securities.

The test, then, would appear to be whether the provincial legislation effectually prohibits the exercise of a corporate power in such a manner as substantially to impair the status and capacity of a federally incorporated company or whether it merely subjects such company, in common with other companies, to regulatory provisions of a general character, a breach of which, while it may lead to penal consequences, does not prevent the company from carrying on its business.

The right of a province to prohibit a particular trade within the province has been affirmed,⁸ but not clearly in relation to companies incorporated by federal charter under the residuary power. Such prohibition by provincial legislation is an aspect rather of the regulation of trade and commerce, to be discussed in another chapter, but in so far as federally incorporated companies are concerned, there would appear to be no reason why they should not be subject, like others, to such prohibition, where it is otherwise valid. The distinction here is between provincial legislation striking at an essential element of the status and capacity of a federally incorporated company, such as a general prohibition to carry on its business, regardless of its nature, or a general prohibition against the issue of its securities, and the necessary effect on such company of a bona fide regulation or even suppression of a particular trade. In other words, in the absence of conflicting federal legislation, the federally incorporated company must take the local conditions of trade in a province as it finds them. Otherwise, it would

enjoy an immunity from regulations applicable to other companies which would not only be discriminatory, but would seriously undermine provincial regulatory power in the broad field of intra-provincial trade and commerce.

Recently, the scope or reach of provincial legislative jurisdiction, in relation to federally incorporated companies, has come before the courts with reference to a power which must necessarily be of the utmost concern to a government with the avowed social and economic purposes of the present Quebec administration, that is, the power to expropriate companies where such expropriation becomes unavoidable in the pursuit of an essential governmental purpose. In British Columbia Power Corp. Ltd. v. A-G B.C.⁹ Lett C.J.S.C. of the Supreme Court of British Columbia held to be invalid provincial legislation providing for the expropriation, in the hands of a federally incorporated holding company, of the shares held by it in a provincially incorporated public utility, on the ground that since the holding of such shares was the whole business of the federal holding company, their expropriation constituted a substantial impairment of the status and powers of such company. The provincial legislation in this case was framed so as to appear to deal with the shares or capital structure of the provincially incorporated public utilities company, by providing that all its shares were vested in the Crown in right of the province, but the court held that the legislation related, not to incorporation or the corporate structure of the provincial company, but to the ownership of its shares -- a matter falling



outside section 92 (11) of the B.N.A. Act -- and one which in this case involved the rights of a federally incorporated company. The court's conclusion was buttressed by a finding that the undertaking of the provincial company was an inter-provincial one within the meaning of section 92 (10)(a) of the B.N.A. Act, which obscures the significance of the decision in relation to provincial jurisdiction affecting ordinary federal companies. There is no suggestion in the case, however, that the provinces do not have the authority to authorize expropriation of the assets of an ordinary federal company, not falling within some such special head of federal jurisdiction as that with respect to inter-provincial works and undertakings, or even the shares of such a company when held by persons or corporations other than a federally incorporated company, but its practical consequence is that the business of provincially incorporated companies may be put beyond the reach of provincial expropriation by having their shares wholly owned by a company incorporated under federal charter for the sole purpose of holding such shares.

In effect, this is to enable federal jurisdiction with respect to the incorporation of companies with Dominion purposes to be used indirectly to frustrate ultimate provincial control over companies falling clearly within the jurisdiction of the provinces. The constitutional answer to this is not clear. It is the possibility of expropriation rather than its actual exercise which is important in modern provincial policy, and it is a serious thing for the courts to remove that possibility by offering business a subterfuge based



on an artificial application of what must have been originally intended to be a relatively modest head of federal jurisdiction. Whether there is to be, in particular circumstances, provincial expropriation of business enterprises, should be determined as a matter of policy, upon appeal, if necessary, to the electorate, and not by artificial obstructions created by the judicial interpretation of the distribution of legislative jurisdiction under the B.N.A. Act. If the decision of the Supreme Court of British Columbia in the B.C. Electric case is allowed to stand, then consideration will sooner or later have to be given to constitutional definition of the expropriation powers of the provincial governments, for no modern government, which does not have this ultimate recourse, can be said to have effective regulatory power with respect to modern business.

The possible consequences, for provincial legislative and administrative policy in the new Quebec, of the division of jurisdiction with respect to what is generally referred to as "company law" are difficult to estimate, but one cannot help feeling that they will eventually assume the proportions of a serious constitutional issue. The limitation of the provincial power to incorporate companies would not appear to create serious practical problems, although it probably has the effect of diverting a good deal of incorporation business to the federal government. The real issue, which requires further clarification by judicial interpretation before one can seriously discuss the necessity of constitutional amendment, is how far provincial legislative jurisdiction

in relation to the ordinary company incorporated by federal charter is to be impeded or nullified by application of the principle that provincial legislation will not be allowed to impair the status and powers of such a company in a substantial degree.

The general federal power to incorporate companies with Dominion objects only exists, in virtue of the residuary clause, because of the qualification of the provincial power of incorporation in section 92 (11) of the B.N.A. Act. The removal of this qualification would, under the present terms of s.91, eliminate the federal power. Any constitutional adjustment respecting this power is, therefore, a delicate matter, since it may be assumed that there will always be insistence on a general federal power of incorporation, if only a concurrent one. The issue seems to be pre-eminently one for adjustment by judicial interpretation, based on a clear distinction between those companies whose business or undertaking requires a special degree of federal control (such as companies operating interprovincial works and undertakings), and ordinary companies having a federal charter (often without any particular necessity of federal control arising out of the character or scope of their actual or intended business operations).

5. Legislative Jurisdiction to Regulate Foreign Corporations.

The distribution of legislative jurisdiction to regulate the right of foreign corporations to carry on business in Canada has been essentially the task of judicial interpretation, since there is no specific head of jurisdiction to which this matter is



obviously related, and while the results are far from clear, it cannot be said that they raise any issue of which the provinces can seriously complain. The courts have rejected attempts by the Parliament of Canada to base such regulation on its legislative authority with respect to aliens and immigration, and in the result, the judicial decisions suggest that the distribution of this particular jurisdiction turns, in the final analysis, on the nature of the business to be carried on by the foreign corporation, and whether such business falls within federal or provincial jurisdiction.¹⁰ While uncertainty prevails as to the precise limits of federal jurisdiction in this field, there seems to be no question of the exclusive character of provincial jurisdiction to regulate the right of a foreign corporation to carry on business of a provincial nature which is confined to a single province. Moreover, in the present state of uncertainty as to the importance to be given to the federal trade and commerce power, in relation to this issue, it is highly unlikely that a successful challenge could be made to provincial regulation on the ground that the business of a foreign corporation was being carried on in more than one province. Finally, it should be noted that provincial jurisdiction with respect to a foreign corporation is not subject to the limitation which protects a federally incorporated company, namely, that there must be no substantial impairment of its status and powers. This anomaly again serves to emphasize the fact that it is illogical that a company should enjoy this relative immunity from provincial regulation merely because it happens to have been incorporated by a federal charter, whether or not its business is one which falls within federal jurisdiction.



CHAPTER VIII. INTER-PROVINCIAL WORKS AND UNDERTAKINGS

The general jurisdiction over works and undertakings would appear, in virtue of s.92 (10)¹ of the B.N.A. Act, to be provincial, but the exceptions, which are expressly excluded in that article from provincial jurisdiction and assigned by the operation of s.91 (29)² to the exclusive legislative competence of Parliament, are of such overriding practical importance in their impact on national and regional affairs that the substantial jurisdiction over this subject matter must be deemed to be federal.

In contrast to the peace, order and good government and trade and commerce clauses, federal jurisdiction with respect to inter-provincial works and undertakings has received, at the hands of the courts, an increasingly liberal construction upon the basis of criteria which could, if rigorously and consistently applied, exclude almost every conceivable aspect of provincial regulation touching these enterprises.

The basis upon which this steady enlargement of federal jurisdiction threatens to proceed is what was essentially an obiter dictum in the early railway case of C.P.R. v. Notre Dame de Bonsecours,³ in which the issue was the relatively modest one of the validity of certain municipal regulations (and the enabling provincial legislation) in virtue of which an inter-provincial railway was required to clean a ditch running alongside its track. The Privy Council held the provincial legislation and municipal regulations valid as being of the class of provincial laws of general application to

which even inter-provincial works and undertakings were subject, and as not falling within the matters which were of the essence of exclusive federal jurisdiction over such works and undertakings. Although it was sufficient for purposes of the case to find that the matter to which the provincial legislation related was not one which fell within exclusive federal jurisdiction, and it was in no way necessary to define the limits of such federal jurisdiction, the latter was alluded to by the Privy Council in a passage which has been repeatedly cited by the courts as defining the scope of exclusive federal jurisdiction with respect to such works and undertakings. Whatever sins may be laid to the door of Lord Watson in regard to alleged distortion of the B.N.A. Act in favour of provincial autonomy, judicial opinion in recent years suggests that the following dictum from the judgment delivered by him in the Bonsecours case may go far to redress the balance in favour of federal power:⁴

The British North America Act, whilst it gives the legislative control of the appellants' railway quâ railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company, but it is, inter alia, reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes.

It might appear that the emphasis in this passage (and indeed there is reason to believe, in view of the facts of the case,

that this was probably Lord Watson's intention) was on the application of provincial laws which do not deal with the essence of the work or undertaking, but the subsequent emphasis has been rather upon the language by which the essentials of federal jurisdiction were alluded to, and in particular upon the word "management". It will be observed that the Bonsecours dictum refers to two quite distinct and separate things: the physical work or undertaking, to which the words "construction, repair, and alteration" must necessarily have reference, and the company or legal entity established to operate the work or undertaking, as indicated by the words "constitution and powers of the company". Now, it is not companies or legal entities, as such, which are the subject matter of federal jurisdiction in virtue of s.92 (10) and s.91 (29) of the B.N.A. Act, but physical things or operations serving or being of utility to more than one province in a connected arrangement which gives them a relative importance and disposition calling for federal rather than provincial legislative regulation. It is precisely that which distinguishes companies operating such inter-provincial works or undertakings from other companies incorporated by federal charter that must be the key to the scope of this particular federal legislative jurisdiction. Yet judicial emphasis on the word "management" in the Bonsecours dictum threatens to enlarge the scope of exclusive federal jurisdiction in this field to include not only the aspects of administration which are peculiar to the particular kind of work or undertaking being carried on but also those which the company operating such work or undertaking has in common with other federally incorporated companies.

Although the word "management" was pronounced, in relation to this head of jurisdiction, in the year 1899, in a context of concern with the physical aspects of a railway (the relationship between clearing a ditch and the maintenance of a railway right of way) and long before the development of such a concept in the field of labour relations as that of "management rights", the word has been invoked in recent years in all its modern business connotation to justify a broad, if not complete, federal jurisdiction over all matters touching employer-employee relations in such enterprises.⁵ The word, taken in this unqualified sense, can obviously be used to justify the exclusion of a wide variety of provincial legislation, for if "management" is to be taken in its ordinary sense, there is hardly any matter susceptible of legislative treatment, including any and all restraints upon the contractual and financial freedom of a corporation, which cannot conceivably be brought within its scope.

This was not always the tendency of judicial interpretation of this head of federal jurisdiction. The distinction between the physical work or undertaking and the company, implicit in the passage from Lord Watson's judgment, and in particular in the words "railway quâ railway", is reflected in decisions of the Privy Council and Supreme Court prior to the Second World War. In particular, these decisions reflect the distinction between exclusive jurisdiction and accessory or necessarily incidental power, which leaves reasonable scope for the exercise of provincial jurisdiction in the absence of federal legislation. On the basis

of these decisions, federal jurisdiction over aspects of the employer-employee relationship in inter-provincial enterprises would be, to the extent that it existed at all, an accessory rather than an exclusive power.

The landmarks of this earlier approach are a decision of the Privy Council in 1907,⁶ in which, without any allusion to the use of the word "management" in the Bonsecours case, it was held that federal legislation prohibiting railways from contracting out of liability for damage suffered by their employees was valid as being ancillary to federal railway legislation; another judgment of the Privy Council in 1920 holding a provincial Workmen's Compensation Act to be valid as applied to an inter-provincial enterprise, not only as direct taxation within the province, but as creating a "statutory condition of the contract of employment" and establishing "a scheme for securing a civil right within the province";⁷ and finally, a judgment of the Supreme Court of Canada in a reference case in 1925 in which the late Sir Lyman Duff appeared to draw the obvious conclusion from these Privy Council decisions when he held, in effect, that legislative jurisdiction with respect to employer-employee relations in inter-provincial works and undertakings was governed by the doctrine of the "unoccupied field".⁸

It was during the post-war period of reaction in favour of federal power that there began to emerge the judicial emphasis on the word "management" in cases touching labour relations in these enterprises. This trend culminated in 1955 with the decision

of the Supreme Court of Canada affirming the validity of the federal Industrial Relations and Disputes Investigation Act.⁹

It was not necessary, for purposes of this decision, to determine whether the subject matter of that act fell within exclusive or merely accessory federal power, but the opinions of the various judges who sat in the case contain a number of allusions to the word "management" as indicating the scope of exclusive federal jurisdiction, and the strongest opinion in favour of federal power expressed in the case is to be found in the following passage from the opinion of Abbott J.:

The right to strike and the right to bargain collectively are now generally recognized, and the determination of such matters as hours of work, rates of wages, working conditions and the like, is in my opinion a vital part of the management and operation of any commercial or industrial undertaking. This being so, the power to regulate such matters, in the case of undertakings which fall within the legislative authority of Parliament lies with Parliament and not with the provincial legislatures.

Other expressions of opinion in the case are more cautious, reserving future judgment as to the scope, if any, to be given to the word "management" and the role to be played by the doctrine of the unoccupied field. It was observed, for example, by Locke J.¹¹ that "the question of jurisdiction as to matters affecting the relations between railway companies and their employees was not one of the questions under consideration in the Bonsecours case and what was said by Lord Watson was not directed to that subject."

But, speaking generally, the opinions exhibit an emphasis on the word "management" which may embarrass the court's consideration

of other issues which are not so intimately related to the physical operation of these enterprises as legislation having for its object the prevention or resolution of paralyzing industrial conflicts. In a word, it was not necessary for the court in this important case to base itself upon the word "management", since it was indisputable that the legislation in question was, at the very least, accessory or necessarily incidental to the effective exercise of exclusive legislative jurisdiction in relation to inter-provincial works or undertakings.

It must be said, with the utmost respect, that this decision is a conspicuous example of the dangers inherent in the expression of judicial opinions beyond the requirements of the particular case. In many ways this tendency characterizes the judgments of the Supreme Court during the fifties, following the abolition of appeals to the Privy Council when, it may be presumed, the Court was particularly concerned to establish new guidelines and to affirm its independence of the more debilitating aspects of the Privy Council's decisions. In this perspective, the opinions expressed in the judgment of the Supreme Court concerning the validity of the federal Industrial Relations and Disputes Investigation Act may be viewed as a strong judicial reaction to the much criticized Privy Council decisions denying federal jurisdiction in the field of labour relations on the basis of the peace, order and good government and trade and commerce clauses. But just as certain expressions of opinion in the Privy Council have tyrannized over the realistic consideration of federal constitutional

needs, so the emphasis on the word "management" threatens to empty provincial jurisdiction of all effective content in relation to inter-provincial enterprises at a time when these are assuming an increasing importance both politically and economically in relation to governmental policy in the province of Quebec.

In this regard, one thinks of the caution expressed by Mr. Justice Vincent C. MacDonald in his published lecture, "Legislative Power of the Supreme Court in the Fifties".¹²

In any event the Court might well exemplify the policy of the Privy Council, early avowed and often restated, that in passing on questions of validity involving the B.N.A. Act "it will be a wise course ... to decide each case which arises ... without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand" (Citizens Insurance Co. of Canada v. Parsons, Queen Insurance Co. v. Parsons (1881), 7 A.C. 96, at p.109) "the object as far as possible [being] to prevent too rigid declarations of the Courts from interfering with such elasticity as is given in the written constitution" (The Combines Investigation Act Case (Proprietary Articles Trade Assoen. v. A.-G. for Canada, [1931] A.C. 310, at p.317)). The Privy Council often disregarded these cautionary precepts to the detriment of that orderly elucidation of the law which results from gradual clarification of terms, as new cases present new aspects of meaning, rather than from great advances marked by subsequent retreats or enervating "explanations."

The absence of effective provincial control over inter-provincial works and undertakings is an important issue in Quebec because of their relationship to regional development. The province is not deprived of revenue from these enterprises because they are subject to direct taxation within the province, but the absence of any regulatory jurisdiction over them leaves the province without

direct means to assure that they provide the services necessary to the balanced economic development of the province. There is some lack of confidence that the particular requirements of the province of Quebec can be given adequate consideration by a regulatory body such as the Board of Transport Commissioners. On the other hand, it is difficult to see how regulation of these services can be divided between the two levels of government. It would not appear to be practical to attempt to separate the intra-provincial from the inter-provincial and international aspects of these services. The capacity of a company to furnish such an inter-provincial service, including all the compensating factors of an economic nature, must be viewed as a whole and cannot be left to the hazard of piecemeal regulation, at least in so far as mandatory service and tariffs are concerned. On the other hand, the importance of these services not only in terms of their influence on economic development but in direct employment is so considerable in the provinces that a serious question arises as to whether we should not attempt to devise some new institutional arrangements whereby the provinces can participate more directly in the formation of policy with respect to their regulation. If it is not practical to give the provinces some measure of concurrent jurisdiction, subject, for example, to a remedial power in the federal government, whereby they can directly influence the intra-provincial development and administration of these services, then the alternative is to find a way by which the provincial point of view can be more directly reflected at the federal level. It seems likely that the absence of effective provincial control over

these enterprises is going to be an increasing cause of dissatisfaction in the province of Quebec, particularly in view of the political propaganda that can be made by extremists of the fact that the province could not expropriate these enterprises even if it were thought desirable. These enterprises are important and provocative symbols of English-speaking and federal government domination of "the commanding heights of the economy" and tend to mock the notion of "maître chez nous". This aggravation could be considerably eased by giving Quebec a feeling of direct participation in the formulation of regulatory policy affecting the particular interests of the province.

As matters stand now, the provinces do not even have jurisdiction with respect to the labour relations of these enterprises, which in Quebec only increases the French-Canadian's sense of alienation and of being without ultimate control or influence over the decisions most intimately affecting his daily life.

CHAPTER IX. THE COMMERCE, FISCAL, AND SPENDING POWERS

We are considering the distribution of legislative power in Canada in the light of the special requirements of the Quebec government as the chief instrument of French-Canadian emancipation and development. The object is to assess the effective limits which the present Constitution imposes upon provincial power in strategic areas having particular relevance to the social and economic objectives of French-Canadian self-determination. At the same time, it is necessary to keep in mind the essential constitutional requirements of the federal government, not only because of their importance to the maintenance of a viable federal state, but also because of their relation to economic welfare in Quebec. (There is, of course, a case to be made for adequate federal power, even if one takes a narrow or self-centered view of Quebec's interests.)

As indicated in Chapter I, it is assumed that what French-Canadians essentially want is not merely an increasing measure of recognition for their distinctive language and culture, but a larger share in the decision-making and economic life of the country, with all that such participation implies in influence, prestige, and material rewards. The relationship of language and culture to these social and economic goals is that, in the present state of bilingualism in Canada, the French-Canadian is seriously handicapped in the pursuit of these goals if he desires to express himself in his own language and to maintain the characteristic way of thinking and living which is the product of French-speaking culture and civilization. It is pessimism concerning the fundamental willingness of the rest of the country to help him to create the conditions in which he can compete effectively in his own language that makes him regard the provincial government as

the main lever with which to pry open the doors of economic opportunity. When French-Canadians speak of constitutional revision today they do not think simply of a solemn affirmation of the equality of the two founding cultures in Canada but of the effective power required by the Quebec government to win for the people of Quebec a more equitable share of economic power and welfare. What the French-Canadian is essentially looking for is some means of coping effectively with the power of English-speaking business. What he sometimes seems to forget in his preoccupation with an essentially ethnic and, as would sometimes appear, racist perspective of his social and economic condition, is that it takes big and broadly based governments to exercise effective control over big business. Political isolation might give a minority in French Canada new economic privileges and advantages as middlemen or shop stewards in the relations of an independent state with foreign business, but in the long run, it would give the majority less security and less effective control over their economic affairs.

In an independent state economic affairs would become to an increasing extent international affairs. If Canada as a whole has difficulty coping with the problems arising from American domination of the Canadian economy, would an independent Quebec find it easier? In the recent guidelines controversy, Quebec spokesmen made more public noise than those at Ottawa but there is no evidence that they were, for all that, taken any more seriously. It is only by building Canadian economic leverage and bargaining power that we can hope to have some influence upon continental economic and commercial policies. Such

influence comes in the measure that Canada can, by regional policies co-ordinated at the national level, have significant impact upon the plans and requirements of others. We maximize the power of economic self-determination at the regional level by maintaining strong and flexible power of economic regulation and assertion at the federal level.

The objectives of provincial policy referred to in Chapter I -- the promotion of economic development on a regional basis, the decentralization and re-distribution of economic power, the creation of employment opportunities by public enterprise, and the securing to French-Canadians of equal opportunity for employment and advancement in the private sector of the economy -- can only be effectively pursued within the context of a healthy and expanding national economy depending in its turn upon continental and world economic conditions. Quebec needs conditions of stable economic growth to absorb the cost and adjustments of its social revolution or program of "national renewal". The enormous increase in governmental expense, with the corresponding increase in the need for taxation revenue, is a factor of serious political instability in the provincial situation as the recent election has indicated. The National Union government has inherited this problem from the Liberal administration, and it remains to be seen whether they can successfully cope with it before they are in their turn rejected by an apprehensive electorate.

The answer is certainly not to attempt to strip the federal government of the fiscal powers which are essential to the discharge of its responsibilities for economic planning and the maintenance of

minimum standards of national welfare, as well as widely distributed purchasing power. The answer lies rather in steady economic growth. Herein lies the importance to Quebec's ultimate welfare of adequate federal power under the Constitution and in particular, adequate power to regulate trade and commerce so as to be able to develop and maintain markets for Canadian goods. Fiscal and monetary policy may influence the direction of investment, but all the credit and tax concessions in the world will not create and maintain employment if there are not markets for the contemplated goods and services.

An allusion has been made in Chapter I to the important function of the federal government as a selling agency for Canadian products. Recent events have only served to emphasize the importance of this role. It would be difficult to exaggerate the contribution to the Canadian economy, including the demand for Quebec goods, of the wheat sales which have been negotiated by the federal government in recent years, assuring a market for all the wheat that Canada can produce until 1970 -- the end of the five-year period contemplated by the First Annual Review of the Economic Council of Canada. These sales create one of the essential conditions for stable economic growth in this period.

Such marketing requires adequate regulatory power to assure grade and quality control and orderly flow of the product to destination. Such power must not be inhibited by theoretical divisions of jurisdiction that bear no relation to the realities of the storage, grading and distribution process. The Courts have affirmed the power of Parliament,

in the establishment of adequate machinery for the orderly marketing of grain, to bring the whole, or substantially the whole, of interprovincial trade in grain under the control of its marketing authority.¹ They have also indicated that such control and regulation may have to go quite far in its interference with intra-provincial transactions because of their general relationship to and power to affect the orderly marketing arrangements for interprovincial and international trade.²

These decisions mark a disposition to rehabilitate the federal trade and commerce power, after years of judicial enfeeblement,³ by reliance on ancillary or necessarily incidental power to validate regulation of intra-provincial operations having intimate connection with interprovincial and international trade and commerce. Such an affirmation of ancillary power in the field of trade and commerce corresponds to the Shreveport doctrine⁴ by which the United States Congress has been able to regulate intra-state matters because of their relationship to effective federal regulation of interstate commerce.

It is unlikely, however, that judicial interpretation will be able to remove the basic uncertainties and inhibitions produced by the present unsatisfactory distribution of legislative jurisdiction in Canada with respect to the regulation of trade and commerce. It is not only the limits of federal power but those of provincial power as well which remain uncertain. Provincial power to regulate trade and commerce has traditionally been considered to rest on the jurisdiction over property and civil rights under head 13 of section 92 of the B.N.A. Act, although the better opinion now would appear to be that it finds a more

logical and comprehensive basis in the jurisdiction under head 16 over "Matters of a Merely local or private Nature in the Province".⁵ But in either case the jurisdiction is limited by the words "in the Province". The problem is to distinguish intra-provincial transactions from those which are a part of interprovincial or international trade. This problem was considered by the Supreme Court of Canada in the Ontario Farm Products Marketing Act reference,⁶ and the conclusion one is obliged to draw from the opinions in this case is that an effective regulation of trade and commerce is impossible by either Parliament or a provincial legislature acting alone. This results from the fact that modern marketing generally involves interprovincial and international, as well as intra-provincial, aspects and it is impossible to draw a clear line between the federal and provincial spheres of regulation. The difficulties were summed up by Rand J. as follows:⁷

It follows that trade regulation by a Province or the Dominion, acting alone, related to local or external trade respectively, before the segregation of products or manufactures of each class is reached, is impracticable, with the only effective means open, apart from conditional regulation, being that of co-operative action; this, as in some situations already in effect, may take the form of a single board to administer regulations of both on agreed measures.

Nor are the existing devices of constitutional flexibility, alluded to in this passage, entirely adequate to cope with the problem on the basis of co-operation. The problem presented by the difficulty of separating the intra-provincial from the interprovincial and international aspects of modern marketing is one of achieving completeness of regulation by constitutionally permissible co-operation, which, of

course, excludes the delegation of legislative, as distinct from administrative, authority. The line of demarcation of exclusive jurisdiction, as distinct from ancillary or necessarily incidental power, shifts according to the criteria which are adopted for defining the intra-provincial transaction. In the Ontario Farm Products Marketing reference, Abbott J. suggested a criterion which would leave some reasonable and ascertainable scope to provincial jurisdiction in the field of marketing. This criterion recognizes that transactions completed within the province do not lose their intra-provincial character, for purposes of the validity of the provincial legislation which purports to regulate them, merely because the products to which they relate may eventually pass into interprovincial and even international trade. The distinction is between the product, and its place of ultimate consumption, and the nature and place of the transactions which are the subject of the regulation. If the place of ultimate consumption is to determine the character of all the transactions relating to the product, then, as stated by Fauteux J., there would be little effective scope left to provincial regulation in this field. This would appear, however, to have been a minority view in the Farm Products case. The majority of the Court based their finding that the provincial legislation was valid on the assumption that the Act purported to apply only to products marketed for use within the province. In other words, the majority would appear to favour the test of ultimate consumption.

A further cause for dissatisfaction with the present distribution of regulatory jurisdiction in respect of trade and commerce is that the judicial decisions have resulted in a constitutional distortion by forcing federal reliance on the criminal law power as a basis for legislation in relation to such matters, intimately connected with trade and commerce, as combines,⁸ food and drug adulteration,⁹ and securities frauds prevention.¹⁰ Anti-combines legislation is so directly connected to the function of buying and selling and to the public interest in freely competitive trade and commerce having interprovincial and international ramifications that it is difficult to understand how it could have been denied validity on the basis of the trade and commerce power. In contrast, American anti-trust legislation has been grounded squarely on the commerce power. A practical consequence of the judicial approach to this question in the Canadian Constitution has been uncertainty as to the scope of federal jurisdiction to deal with the subject of combines by means of civil law administration and remedies, which are in many ways more appropriate than criminal law treatment for such a field of regulation.¹¹

Moreover, the Courts have had to remind Parliament from time to time of the limits imposed by the doctrine of colourability on the use of the criminal law power to support trade regulation, particularly where such regulation touches *intraprovincial* activity. The decision of the Supreme Court of Canada in the Margarine case,¹² which affirmed the validity of the federal prohibition of the importation of margarine as being legislation in relation to international trade, but denied

validity to the prohibition of manufacture and sale within the province, as being legislation in relation to property and civil rights, indicates that the criminal law power will not be permitted to fill the gap which judicial interpretation has left in the federal trade and commerce clause.¹³

The question that is inevitably raised by the state of the law concerning jurisdiction in respect of trade regulation in Canada and the difficulties alluded to in the Farm Products Marketing Act reference is whether federal and provincial jurisdiction to regulate trade and commerce should not be fully concurrent. The constitutional right to delegate administrative authority is not a completely satisfactory answer to the present difficulties since federal or provincial legislation attempting to deal effectively with the marketing of products, some or all of which cross the boundaries of a province, is inevitably going to encounter serious doubts as to the validity of at least some of its aspects.¹⁴ There is no doubt that primacy would have to be given in matters of interprovincial and international trade to the legislation of Parliament, but we may safely assume that there would be the fullest possible intergovernmental consultation and co-operation to avoid unnecessary conflict between provincial and federal legislation. The great utility of concurrent jurisdiction in this field would be to give constitutional security, and accordingly the certainty that is so important in the field of commerce, to federal and provincial legislation directed in its broad lines to bona fide dominion and provincial aspects of trade and commerce. It would also give Parliament

and the provincial legislatures much greater flexibility, permitting them to intervene in such regulation only to the extent which seems absolutely necessary to achieve specific legislative purposes.¹⁵

Fully concurrent jurisdiction, to be exercised in accordance with politically negotiated agreement, would also appear to be the constitutional arrangement best adapted to the flexible use of fiscal and spending powers in Canada. The major constitutional problem in Canada today is undoubtedly that which relates to the fiscal or revenue powers of the two levels of government. The problem has been succinctly stated by Laskin as follows:¹⁶

It has become a truism of Canadian constitutional law that judicial interpretation of the B.N.A. Act has given the provinces substantive legislative authority (specially in respect of social services) that far exceeds their financial resources and their money-raising power, while it has left the Dominion with financial resources through an ample taxing power overshadowing its regulatory authority. Having regard to this result of the legal division of powers, and to the disparate economic strength of the various provinces inter se, it is understandable why the financial relations of Dominion and provinces have become a central issue in Canadian federalism -- an issue in which the strict legal position is of secondary importance ...

The problem is a highly complex one because it does not merely involve the financial capacity of the two levels of government to discharge their respective legislative and administrative responsibilities (although this is necessarily the immediate cause of the crisis), but it also involves the role of fiscal policy in economic regulation and planning. Fiscal policy is one of the chief instruments by which modern government controls and directs investment to promote and reconcile the goals of economic growth and price stability. By

fiscal policy government is able to encourage the development of certain enterprises and even to influence their location. It is also a means, in addition to monetary policy, by which government can influence the volume of savings or investment capital available for economic expansion. It is further a technique for the re-distribution of income not only within a region but across the country as a whole. It is thus not simply a means of obtaining the money necessary for essential government functions but an important tool of economic policy. It is these two essential purposes of fiscal power that must be kept in mind in determining the appropriate distribution of such power from time to time in Canada.

Provincial dissatisfaction with the distribution of financial power under the present Constitution is principally directed to what is sometimes referred to as the "federal spending power". The federal government is taxing beyond the financial requirements of its own sphere of legislative jurisdiction and is spending the surplus in areas which fall under provincial legislative competence. The resulting complaint of provincial governments, which find themselves without the necessary financial resources to discharge their own constitutional responsibilities, is both understandable and well-founded if the issue is not to be regarded in narrow legal terms. But even on a legal view, there is much to be said for the argument that the spirit, if not the letter, of the Constitution requires that the two co-ordinate levels of government should, as far as possible, confine the exercise of their fiscal powers to the financial requirements of their respective constitutional responsibilities.

In strict law, the provincial taxing power is an explicitly limited one, and on its face the federal power would appear to be unlimited. By ss. 2 of s.92 the provinces are given exclusive legislative jurisdiction with respect to "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes", and by ss. 3 of s.91 the jurisdiction of Parliament extends to "the raising of Money by any Mode or System of Taxation". The interesting qualification of provincial power, in the light of the current constitutional controversy, is that which is contained in the words "in order to the raising of a Revenue for Provincial Purposes". There is no comparable or corresponding express limitation of the federal taxing power. The broad relationship between the federal and provincial taxing powers was considered by the Privy Council in Caron v. The King,¹⁷ in which it was said:¹⁸

As such particular direct taxation is reserved to the Province, to that extent there is some deduction to be made from the totality of power apparently given exclusively to the Dominion Parliament to raise money for any purpose by any mode or system of taxation.

This apparent antimony has been noted in various decisions. It is sufficient to mention Citizen's Insurance Co. v. Parsons and the Bank of Toronto v. Lambe. In the latter case, their Lordships observed as follows: 'It is impossible to give exclusively to the Dominion the whole subject of raising money by any mode of taxation, and at the same time to give to the provincial Legislature, exclusively or at all, the power of direct taxation for provincial or any other purposes. This very conflict between the two sections was noticed by way of illustration in the case of Parsons': And after quoting from the earlier judgment, their Lordships proceeded: 'Their Lordships adhere to that view, and hold that, as regards direct taxation within the Province to raise revenue for provincial purposes, that subject falls wholly within the jurisdiction of the provincial Legislatures.'

Both sections of the Act of Parliament must be construed together; and it matters not whether the principle to be applied is that the particular provision in head 2 of s.92 effects a deduction from the general provision in head 3 of s.91, or whether the principle be that head 3 of s.91 is confined to Dominion taxes for Dominion purposes.

The only occasion on which it could be necessary to consider which of these two principles was to guide, would be in the not very probable event of Parliament of Canada desiring to raise money for provincial purposes by indirect taxation. It might then become necessary to consider whether the taxation could be supported, because the power to impose it, given by head 3 of s.91, had not been taken out of the general power by the particular provision, or because though not given by head 3, it was given as a residual power by the other parts of s.91. But no such question arises now.

Upon any view there is nothing in s.92 to take away the power to impose any taxation for Dominion purposes which is *prima facie* given by head 3 of s.91. It is not therefore *ultra vires* on the part of the Parliament of Canada to impose a Dominion income tax for Dominion purposes; and the first point must therefore be decided against the appellant.

There are two conclusions to be drawn from this statement which are of special relevance to the general question of taxing power in relation to governmental needs: first, the federal government does not have power to impose direct taxation for provincial purposes; and secondly, the precise constitutional basis of the federal imposition of other kinds of taxation, for other than Dominion purposes, was left to future consideration.¹⁹ What is clear is that the validity of direct taxation by the federal government must necessarily rest on the assumption of a valid federal purpose.

The issue turns precisely on what is to be understood by a federal, as opposed to a provincial, purpose. It is impossible to unscramble federal revenue so as to identify the governmental purpose to which each source of such revenue is appropriated or directed. So

long as the federal government has an apparently unlimited power to raise revenue by means of indirect taxation, and it is not conceded that such power must be exercised only for Dominion purposes, then it is impossible to rest the provincial case against the exercise of the federal spending power in areas falling under provincial legislative jurisdiction entirely on the legal limits of the federal power to impose direct taxation. The federal spending power is assumed to rest on head 1A of s.91 of the B.N.A. Act, which confers upon Parliament exclusive legislative jurisdiction over matters falling within the class of subjects described as "the Public Debt and Property". There is no comparable or corresponding provision in section 92. The power to impose taxation under head 2 and the power to borrow money on the sole credit of the province under head 3 of section 92 necessarily imply power in the provincial legislature to dispose of such money. Moreover, it is a clear implication of section 53 and section 90 of the B.N.A. Act that the provincial legislatures are to be considered to have essentially the same power of appropriation as the Parliament of Canada. Apart, therefore, from the question of legislative jurisdiction, there is no reason to assume that the provincial spending power should be less free in scope than the federal power is asserted to be by its proponents. In other words, if the federal government is constitutionally empowered to spend its revenue for purposes other than those over which it has legislative jurisdiction then the same must be true of the provincial governments. The result is that the spending power can make a mockery of the distribution of legislative jurisdiction. This in fact is what has taken place as a result of the federal policy to spend money in areas beyond its legislative competence.

The issue is touched on by both the Supreme Court of Canada and the Privy Council in the Reference re Employment and Social Insurance Act.²⁰ Those who support an unrestricted federal spending power tend to emphasize what was said in that case by Duff C.J. in his dissenting opinion:²¹

We are satisfied that if Parliament out of public monies exclusively were to constitute a fund for the relief of unemployment and to give to unemployed persons a right to claim unemployment benefits, to be paid out of that fund upon such conditions as Parliament might see fit to prescribe, no plausible argument could be urged against the validity of such legislation.

Needless to say, this assumes that Parliament is merely authorizing the expenditure of public money upon certain stipulated conditions and not in pith and substance regulating matters which fall outside its legislative jurisdiction, in accordance with the distinction emphasized by the Privy Council in In re Insurance Act of Canada:²²

Now as to the power of the Dominion Parliament to impose taxation there is no doubt. But if the tax as imposed is linked up with an object which is illegal, the tax for that purpose must fall.

Nevertheless, in the Privy Council's judgment in the Employment and Social Insurance Act reference, serious doubt was cast upon the constitutional validity of federal expenditure for purposes falling under exclusive provincial legislative jurisdiction. The ground of the Privy Council's decision that the federal act was ultra vires was that it affected the civil rights of employers and employees in the province and was therefore an usurpation of provincial

jurisdiction over property and civil rights under head 13 of s.92, but with respect to the opinion of the minority in the Supreme Court that the legislation was valid as an exercise of the unlimited federal power, under head 3 of s.91, to dispose of public money raised by any mode or system of taxation, Lord Atkin said:²³

It only remains to deal with the argument which found favour with the Chief Justice and Davis J., that the legislation can be supported under the enumerated heads, 1 and 3 of s.91 of the British North America Act, 1867:
(1.) The public debt and property, namely (3.) The raising of money by any mode or system of taxation. Shortly stated, the argument is that the obligation imposed upon employers and persons employed is a mode of taxation: that the money so raised becomes public property, and that the Dominion have then complete legislative authority to direct that the money so raised, together with assistance from money raised by general taxation, shall be applied in forming an insurance fund and generally in accordance with the provisions of the Act.

That the Dominion may impose taxation for the purpose of creating a fund for special purposes, and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities, could not as a general proposition be denied. Whether in such an Act as the present compulsion applied to an employed person to make a contribution to an insurance fund out of which he will receive benefit for a period proportionate to the number of his contributions is in fact taxation it is not necessary finally to decide. It might seem difficult to discern how it differs from a form of compulsory insurance, or what the difference is between a statutory obligation to pay insurance premiums to the State or to an insurance company. But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.

It may still be legislation affecting the classes of subjects enumerated in s.92, and, if so, would be ultra vires. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect

of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the Provincial domain.

The wording of this passage in the opinion of the Privy Council leaves the question open as to what is to be considered in pith and substance an invasion or encroachment of civil rights or some other field of provincial jurisdiction. It is from the provincial point of view an irritating quibble to contend that since the conditional grant in aid is not compulsory it is not a positive assertion of regulatory power. In the first place, it is only made possible because the federal government has more money than it requires for its own legislative responsibilities. In the second place, it can only be refused by the provinces, or by institutions within the province to which it is offered, if they are prepared to sacrifice material interests to principle. And finally, if accepted, the conditions upon which it is given necessarily involve the regulation of a provincial field of jurisdiction. There can be no doubt that they constitute an interference with provincial power and policy. It has been the necessary political recognition of this fact, under pressure from the Quebec government, that has led to the federal "opting out" formula. This formula has done a good deal to ease the fiscal crisis, but the larger issue remains as to whether the federal government should persist in raising more revenue than it requires for the matters over which it has legislative jurisdiction. The problem is that there is only so much potential public revenue to be apportioned between the federal, provincial and municipal governments in Canada. Although there is no

constitutional obstacle to double taxation, the economic arguments against it are obvious, and the solution of the fiscal problem lies not in an insistence on legal rights but in legislative self-restraint based on an agreed partition according to governmental priorities.

The solution from the constitutional point of view would not appear to lie in the attribution to either level of government of exclusive power over particular fields of taxation. The problem is one which must be settled by political negotiation, from time to time, according to governmental needs and economic conditions. The most flexible constitutional frame-work would seem to be one which gives both the federal and provincial governments the broadest possible range of constitutionally valid options.

One possible amendment would be to place the federal and provincial taxing powers on a basis of parity. Thus head 3 of s.91 would read "The raising of Money by any Mode or System of Taxation for Dominion Purposes", and head 2 of s.92 would read "The raising of Money by any Mode or System of Taxation within the Province for Provincial Purposes". Of course, the expression "Dominion Purposes" might be considered to beg the essential issue since it is presently contended that the exercise of the federal spending power to compensate for disparity in regional development and income is a valid federal purpose. Perhaps it would be more precise to employ the words "for purposes falling within the legislative jurisdiction of Parliament".

Would such an amendment affect the constitutional validity

of tax rental agreements? Concerning their current validity and effect, Laskin makes the following observations:²⁴

No delegation is involved because the Dominion is clearly entitled in any event to levy such taxes. And it is to be doubted that the Dominion-Provincial tax arrangements can be attacked as involving direct taxation by the Dominion within a Province to raise revenue for provincial purposes. The law on the matter is, however, enmeshed in economic and political considerations which go to the very heart of Canadian federalism: see Scott, "The Constitutional Background of Taxation Agreements", (1955) 2 McGill L. J. 1. Indeed, the taxation agreements are not legally enforceable against the Dominion except as they may involve legislative acceptance of jurisdiction for their implementation: see In re Taxation Agreement between Saskatchewan and Canada, [1946] 1 W.W.R. 257. Moreover, it is open to a Province to pass valid legislation in derogation of the agreements: see Van Buren Bridge Co. v. Madawaska and A-G. N.B. (1958) 15 D.L.R. 2d 763, 41 M.P.R. 360. The contrary intimation in Alworth Jr. v. A-G B.C. (1959) 20 D.L.R. 2d 544 (B.C.) (affirmed on appeal with express exclusion of any determination on this point (1960) 24 D.L.R. 2d 71) is incompatible with well-understood constitutional principle. No so-called contract between Dominion and Province can operate as a constitutional limitation on provincial taxing power to the advantage of a person caught by a provincial statute which violates the contract.

The problem is to give Quebec the fiscal flexibility it requires without preventing the federal government from entering into tax agreements with the other provinces, nor from spending, where they are concerned, in areas which Quebec considers should come under its control. For this purpose, the best approach would appear to be to give the province the same unqualified power to legislate for "the raising of Money by any Mode or System of Taxation" as Parliament now has, leaving it to intergovernmental agreement and the technique of "opting out" to permit Quebec to obtain the special

status in fiscal and welfare matters which it consideres necessary for the realization of its social and economic goals. Such an amendment to provincial constitutional power in the field of taxation would also have the merit of freeing provincial regulatory jurisdiction from problems created by the distinction between direct and indirect taxation.²⁵



CHAPTER X. THE COURTS

The system of judicature provided by the B.N.A. Act is a cause of some dissatisfaction in the Province of Quebec. The chief issues are the federal appointment of the judges of the more important courts in the province, and the legal status, jurisdiction, and composition of the Supreme Court of Canada.

The primary responsibility for the administration of justice devolves upon the provinces in virtue of their legislative jurisdiction under head 14 of section 92 of the B.N.A. Act,¹ but while the provinces have legislative jurisdiction to provide for the constitution, maintenance, and organization of all provincial courts of civil and criminal jurisdiction, the judges of the more important of these courts, described in section 96² of the B.N.A. Act as "Superior, District and County Courts", must be appointed by the federal government. Moreover, it is the Parliament of Canada which fixes their salaries, allowances and pensions.³ By section 99 of the B.N.A. Act, Superior Court judges have a constitutionally guaranteed tenure "during good behaviour" subject to compulsory retirement at the age of seventy-five.⁴ The only restrictions upon the discretion of the federal government, in the exercise of its appointment power under s.96, are those contained in ss. 97 and 98⁵ which, in the case of Quebec, assures that its judges will have the necessary training and experience required for administration of the civil law system of justice.

The provisions contained in ss. 96 and following of the B.N.A. Act have traditionally been regarded as essential safeguards of judicial



independence in Canada. Indeed, in one case, they were referred to by the Judicial Committee of the Privy Council as the "principal pillars in the temple of justice".⁶ The Province of Quebec is no longer prepared, however, (it if ever was) to concede that federal appointment is the only guarantee of judicial independence under the Constitution or that the federal government is as well qualified as the provincial government to choose persons having the necessary professional qualifications and experience to administer justice in accordance with the spirit of provincial law, custom, and social values.

In 1938, the late Sir Lyman Duff⁷ had occasion to say something in favour of the provincial power of appointment in the increasingly important areas of jurisdiction affecting the daily lives of the people. He said:

In the argument addressed to us there is an underlying assumption that the interest of the people of this country in the independent and impartial administration of justice has its main security in sections 96, 97, and 99. Now, there were weighty reasons, no doubt, for those sections, and a strict observance of them as regards the judges of courts within their purview is essential to the due administration of justice. But throughout the whole of this country magistrates daily exercise, especially in the towns and cities, judicial powers of the highest importance in regard more particularly to the criminal law, but in relation also to a vast body of law which is contained in provincial statutes and municipal by-laws. The jurisdiction exercised by these functionaries, speaking generally, touches the great mass of the people more intimately and more extensively than do the judgments of the Superior Courts; and, it would be an extraordinary supposition that a great community like the Province of Ontario is wanting, either in the will or in the capacity, to protect itself against misconduct by these officers whom it appoints for these duties; and any such suggestion would be baseless in fact and altogether valueless as the foundation of a theory controlling the construction of the B.N.A. Act.

The objection to the federal appointment power under section 96 of the B.N.A. Act does not flow from a mere desire on the part of the province to wrest an important area of judicial patronage from the federal government but derives essentially from the difficulties created by the provisions in ss. 96 and following in connection with the re-distribution of jurisdiction among the various provincial courts, as well as the transfer of certain problems from courts to administrative tribunals. In a word, the federal appointment power creates serious problems for provincial reform of the administration of justice.

The effect of ss. 96 and following of the B.N.A. Act, as interpreted by the courts, is to invalidate a transfer of jurisdiction from a provincial court presided over by federally appointed judges to a court presided over by provincially appointed judges if, in the exercise of such jurisdiction, the latter court becomes a superior, district or county court within the meaning of section 96, or a tribunal analogous thereto. Section 96 has been invoked not only to challenge transfers of jurisdiction from one provincial court to another but also, from time to time, to challenge the jurisdiction conferred upon administrative tribunals. Although the actual damage done to provincial jurisdiction by attacks based on this ground has not so far been substantial, it is a continuing source of embarrassment and uncertainty overshadowing all provincial statutory authority of an adjudicative character, and particularly that which involves determination of questions of law.⁸

Two recent examples will suffice to illustrate the kind of uncertainty which these provisions of the Constitution may cause with respect to provincial efforts to re-distribute judicial business in the interests of a more efficient administration of justice. In both cases, the provincial Courts of Appeal held that the challenged jurisdiction could not be validly exercised by the judges upon whom it had been conferred because their appointment and tenure did not conform to sections 96 and following of the B.N.A. Act. In both cases they were reversed by judgments of the Supreme Court of Canada, but the result of the cases is to leave many important questions unsettled. It is too much to hope that all the difficulties can be circumvented by the judicial flexibility exhibited in these two decisions of the Supreme Court.

In the reference concerning the jurisdiction of the Quebec Magistrate's Court,⁹ the question put by the provincial government to the Quebec Court of Appeal was whether proposed legislation to increase the monetary limits of the jurisdiction of the Magistrate's Court in the general run of cases from \$200 to \$500 was unconstitutional. The obvious purpose of the proposed amendment was to speed up the administration of justice by relieving some of the pressure on the Superior Court. In essence, the issue raised by the question which the Lieutenant-Governor in Council referred to the provincial Court of Appeal was whether judges appointed by the province could validly exercise this additional jurisdiction, presently exercised by the Superior Courts, or whether it could be exercised only by judges appointed by the federal government in accordance with section 96 of the B.N.A. Act. The

provincial Court of Appeal referred to all the jurisdiction which had been conferred upon the Magistrate's Court since it was established in 1869 and came to the general and stunning conclusion that the Court, viewed as a whole, was now a Court within the meaning of section 96 and that its provincially appointed judges were not qualified to exercise any of its jurisdiction. This judgment was reversed in the Supreme Court on the ground that the Court did not have the right to consider elements of jurisdiction other than that referred to in the question put by the Lieutenant-Governor in Council, and that, in the light of the principles affirmed by Sir Lyman Duff in Reference re Adoption Act,¹⁰ the proposed increase in the monetary limits of jurisdiction would not by itself make the Magistrate's Court a section 96 court calling for federal appointment of its judges. But the questions raised by the provincial Court of Appeal as to the validity of other elements of the jurisdiction of the Magistrate's Court remain and have encouraged several attacks upon the Court's jurisdiction in important areas affecting municipal and school affairs. The result is jurisdictional uncertainty which will continue to embarrass the administration of justice in the province until the pending issues are finally resolved by judgment of the Supreme Court.

In the other important recent case,¹¹ the issue was whether County Court judges could, as "Local Judges" of the Supreme Court of British Columbia, validly exercise the divorce jurisdiction of the Supreme Court. In effect, the issue was not the transfer of jurisdiction from a section 96 court to one presided over by provincially

appointed judges, as in the Magistrate's Court case, but the exercise of a superior court's jurisdiction by a judge who, although appointed by the federal government, so as to satisfy the requirements of section 96 of the B.N.A. Act, had a tenure which, as "Local Judge" of the Supreme Court, depended on his tenure as a County Court judge, and might therefore be thought not to conform to the tenure during good behaviour required by section 99 for superior court judges. The case raised an issue of the greatest practical importance because several of the commonlaw provinces have resorted to the special office of "Local Judge" to increase the judicial manpower available for the exercise of superior court jurisdiction.

In affirming the validity of the provincial legislation, the Supreme Court of Canada paid slight attention to the problem raised by section 99 of the B.N.A. Act, indicating that the Court would not be quick to discover obstacles to the distribution of jurisdiction between federally appointed judges. But the insistence in the reasons for judgment upon the fact that the "Local Judges" had been appointed as such by the federal government and were exercising the jurisdiction of the Supreme Court and not that of County Court judges makes this decision of little assistance to the provincial point of view in the kind of issue which arises in connection with the transfer of jurisdiction from the Superior Court to the Quebec Magistrate's Court or the "Provincial Court",¹² as it is now to be called.

It should be possible to deal with the issues involved in judicial appointment and tenure on their own merits in a manner which does

not create unnecessary problems for the provincial administration of justice. It is not appointment by one government or another which creates the conditions of judicial independence but the constitutional protection afforded to tenure and remuneration. The essential conditions are tenure during good behaviour, up to a reasonable age of compulsory retirement, and salary and pension which cannot be reduced by the government of the day as a means of coercing the judiciary.¹³ A judge will either desire to exhibit judicial independence and impartiality or he will not. If he does not, it matters little which government appoints him. It is a bad appointment. The Constitution cannot guarantee judicial independence; it can merely give an honest and competent judge the necessary security to permit him **to** do his duty. It is the appointment process which goes to the selection of persons of the necessary probity and professional competence to make wise use of the conditions of judicial independence. This is the issue of whether the power of judicial appointment should be a matter entirely within the discretion of the government of the day, or whether that discretion should be circumscribed by the need to make the choice from a list of candidates proposed by an independent and representative advisory body or by the need to obtain subsequent confirmation by such body.

Despite the criticism which is directed from time to time against the system of "political appointments", it is difficult **to** see how final responsibility for judicial appointment in a democracy can be left on other than a political basis. If the people are not to appoint the judges directly by election then those who do so should be answerable to the people for such appointment.

If judicial appointment is to be left to government, however, the only way to avoid the kind of problems which have been created by sections 96 and following of the B.N.A. Act would be to give the government of Canada the power to appoint the judges of federal courts, but to leave with the provinces the power of appointment to all courts of provincial jurisdiction. The problem of judicial independence could be dealt with by providing constitutional guarantees of tenure and salary for the judges of all courts in Canada having jurisdiction of a certain relevant importance. It would be left to the governments concerned to broaden their basis of consultation with professional bodies and others competent to give advice as to the suitability of candidates, but the responsibility for appointments would remain theirs. Any power in a non-political body either to limit the range of choice or to reject appointments must tend to negate the principle of political responsibility.

This arrangement would not be entirely satisfactory to certain critics in Quebec of the composition and functions of the Supreme Court of Canada. There has been a good deal of criticism of the Supreme Court of Canada appearing in the French language newspapers in recent years but it is perhaps sufficient, for purposes of this study, to consider what is said on this subject in the report of the Tremblay Commission¹⁴ and more recently by Professor Jacques-Yvan Morin,¹⁵ who has shown particular concern with the extent to which the bi-cultural character of Canada may be better reflected in its public institutions. Their recommendations would appear to find a common source of inspiration

in the example offered by the Federal Constitutional Court of West Germany established by the Bonn constitution of 1949.¹⁶

The criticism by the Tremblay Commission is directed to the necessity of impartiality and independence in a supreme constitutional tribunal and the extent to which public confidence in the impartiality and independence of the Supreme Court of Canada, at least in the Province of Quebec, is undermined by the fact that its existence, jurisdiction and composition find no basis or guarantee in the Constitution but depend entirely upon the will or discretion of the federal government. These criticisms have reference specifically to the fact that section 101 of the B.N.A. Act empowers the Parliament of Canada to create a "General Court of Appeal for Canada", but does not guarantee its existence; the fact that the Parliament of Canada may define the jurisdiction of the Supreme Court as it sees fit and has steadily increased the Court's jurisdiction since it was established in 1875; and finally, the fact that appointments to the Court are made by the federal government alone.

The Tremblay Commission recommended the establishment of a "Court of Constitutional Affairs" composed of nine members, of whom five would be judges of the present Supreme Court and the remaining four "would be chosen by the four large regions of which Canada is composed, the Maritimes, Quebec, Ontario, and Western provinces, each naming its representatives in the same way that countries name theirs to the International Court of Justice".¹⁷ The Report refers with approval to the West German Constitutional Court as exhibiting

two important characteristics: the separation or specialization of constitutional jurisdiction and the participation of the states or regional governments in the appointment of the members of the federal constitutional court. The West German court is composed of twenty-four judges, one-half of whom are elected by the lower house of the federal legislature, and the other half by the upper house. The election is made on a different basis in the two houses. The lower house makes its choice through an electoral committee of twelve members elected on a basis of proportional representation and thus reflecting party political strength in the house. In the upper house, the vote is made by the house as a whole with a two-thirds majority necessary for election. It is by means of this vote in the upper house, which is composed of persons appointed by the governments of the states, that the states or regional governments participate in the appointment of members to the constitutional court.

The size of the Federal Constitutional Court of West Germany and the manner of its appointment are frankly designed to permit, and in fact encourage, a wide degree of representation of differing political, social, and cultural outlook but its structure is generally acknowledged to be unwieldy and has led to conflicts within the Court itself without the compensating efficiency which might have been expected from a court composed of so many judges. In fact, the manner in which its judges are selected is reflected within the court in a "two-senate" approach to its organization and distribution of labour. The court thus appears as a projection of the political or legislative institutions which participate in its selection.¹⁸

The criticisms of the Supreme Court of Canada, particularly in its function as a court of constitutional review, and the proposal for the establishment of a specialized constitutional court raise two fundamental issues: the true basis in our polity of judicial independence and the best manner in which to transact judicial business of a constitutional character. On the first point, there is little to be added to what has already been said in this essay,¹⁹ although there could be no objection to a constitutional amendment which would both guarantee the existence of the Supreme Court as a final appellate tribunal with power of constitutional review, and would extend to its members the constitutional guarantees of tenure and salary security presently enjoyed by judges of the provincial superior courts under the terms of sections 96 and following of the B.N.A. Act.²⁰ This proposal would disarm any criticism of the Court based on the notion that its existence and the tenure of its judges remain subject in the final analysis to termination by an act of Parliament, but it would not answer the doubts (however ill-founded) concerning the Court's ability, with a composition determined by the federal government alone, to bring an informed and sympathetic understanding to the consideration of Quebec's constitutional and cultural requirements. It may be that serious consideration should be given to requiring confirmation of appointments to the Supreme Court by a reformed Senate that is more representative of the bi-cultural character of the country, such as is advocated by Professor Morin as a means of giving institutional expression to a special and associated status for Quebec.²¹ There is a good deal to be said, however, against the proposal to remove constitutional cases from

the Supreme Court and to assign them to a specialized tribunal. Objections to this proposal go to the very essence of the judicial process in relation to constitutional matters.

The experience of our courts in the treatment of constitutional issues suggests that it is unwise to consider them divorced from the private or public law situations in which they arise. It is generally conceded that while there are undoubted conveniences to the constitutional reference case, by which a government may obtain the opinion of the Court on the constitutionality of proposed legislation, the disposition of constitutional issues can be handled with greater precision and judicial insight in concrete cases, where such issues can be narrowed, if not altogether avoided, and where the implications of social and economic fact and the operational effect of challenged laws are more readily perceptible.²² The handling of constitutional issues in concrete cases permits a much more delicate adjustment of the Constitution to changing conditions since it is essentially a pragmatic rather than an a priori approach. At the same time, it requires a court, not of a specialized character, but one with the broad knowledge and generalized experience needed to deal effectively with every branch of law.

NOTES

CHAPTER I.

1. Preliminary Report, Appendix IV.
2. Preliminary Report, p.23.
3. Loc. cit.
4. Ibid., p.109.
5. Frank Scott and Michael Oliver (eds.), Quebec states her case (Toronto: Macmillan of Canada, 1964), p.138.
6. This report will be referred to hereafter for convenience as the "Deutsch Report".
7. Scott and Oliver, op. cit. p.65.
8. Ibid., pp. 21 et seq.
9. Ibid., pp. 135 et seq. ..
10. Quoted in The Amendment of the Constitution of Canada (Ottawa: Queen's Printer, 1965), p.19.

CHAPTER II.

1. See Confederation Debates (Quebec: Hunter, Rose & Co., 1865), p.263, where Alexander Galt is quoted by A. A. Dorion as having said: "We may hope that, at no far distant day, we may become willing to enter into a Legislative Union instead of a federal union, as now proposed. We would have all have had desired a legislative union, and to see the power concentrated in the Central Government as it exists in England, spreading the aegis of its protection over all the institutions of the land, but we found it was impossible to do that at first. We found that there were difficulties in the way which could not be overcome." At p. 250 in the same speech, Dorion is reported to have said: "But the Confederation I advocated was a real confederation, giving the largest powers to the local governments, and merely a delegated authority to the General Government -- in that respect differing in toto from the one now proposed which gives all the powers to the Central Government, and reserves for the local governments the smallest possible amount of freedom of action."

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2. MacDonald himself, in refusing to allow any consideration of amendment of the Quebec resolutions and in insisting that they be voted on as a whole, referred to them as embodying a treaty, but it would seem that he regarded them as a treaty between the province of Canada and the other provinces rather than one between the French-speaking and English-speaking populations. (See P. B. Waite (ed.), The Confederation Debates in the Province of Canada/1865 (Toronto: McClelland and Stewart Limited, 1964 [The Carleton Library No. 2]), pp. xiii, xcii.)
3. [1914] A.C. 237 at p.253.
4. In re The Regulation and Control of Aeronautics in Canada, [1932] A.C. 54 at p.70.
5. Report of the Royal Commission of Inquiry on Constitutional Problems, 1956, Volume II, p.153.
6. Henry Howard Molyneux, Earl of Carnarvon, "Speeches on Canadian Affairs", Sir Robert Herbert (ed.), (London: 1902), pp.101-102. On the other hand, one should not overlook the following passage in the speeches of Lord Carnarvon, emphasized by the Tremblay Report, Vol. II, at p.142: "Lower Canada, too, is jealous, as she is deservedly proud of her ancestral customs and traditions; she is wedded to her peculiar institutions, and will enter this union only upon the distinct understanding that she retains them The Coutume de Paris is still the accepted basis of the Civil Code, and their national institutions have been alike respected by their fellow-subjects and cherished by themselves. And it is with these feelings and on these terms that Lower Canada now consents to enter into this Confederation."
7. [1932] A.C. 54 at pp.70-71.
8. The importance of this concern and of the proposed power of reservation and disallowance to be given to the central government may be judged from the reassurances which were given by Sir Etienne-Pascal Tache in the Legislative Council during the Confederation Debates. He is reported to have said: "He believed the French Canadians would do all in their power to render justice to their fellow-subjects of English origin, and it should not be forgotten that if the former were in a majority in Lower Canada, the English would be in a majority in the general government, and that no act of real injustice could take place, even if their disposition were to perpetrate it, without its being reversed there." (Waite, op. cit., p.24.)
9. P. B. Waite, The Life and Times of Confederation, 1864-1867 (University of Toronto Press: 1962) pp.138-140.

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10. [1914] A.C. 237 at p.252.
11. Bonanza Creek Gold Mining Company, Limited v. Rex, (1916) 1 A.C. 566 at p.579; Murphy v. C.P.R., [1958] S.C.R. 626 at pp.640-641.
12. Bank of Toronto v. Lambe, (1887) 12 A.C. 575 at 587; A-G Ontario v. A-G Canada, [1912] A.C. 571 at 581; Murphy v. C.P.R. and A-G Can., [1958] S.C.R. 626 at 643.
13. Sections 90 and 56 of the B.N.A. Act, which read:

"90. The following Provisions of this Act respecting the Parliament of Canada, namely,--the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved,--shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada."

"56. Where the Governor General assents to a Bill in the Queen's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to one of Her Majesty's Principal Secretaries of State, and if the Queen in Council within Two Years after Receipt thereof by the Secretary of State thinks fit to disallow the Act, such Disallowance (with a Certificate of the Secretary of State of the Day on which the Act was received by him) being signified by the Governor General, by Speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the Day of such Signification."

14. Section 93 of the B.N.A. Act, which reads:

"93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:--

- (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union;
- (2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the

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Dissentient Schools of the Queen's Protestant Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section."

15. Section 58 of the B.N.A. Act, which reads:

"58. For each Province there shall be an Officer, styled the Lieutenant Governor, appointed by the Governor General in Council by Instrument under the Great Seal of Canada."

A further measure of federal control, through the office of Lieutenant Governor, is the power to reserve provincial legislation for signification of the Governor General's pleasure.

16. Section 96 of the B.N.A. Act, which reads:

"96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

17. The Tremblay Report, Vol. II, p.160, refers to these powers as "unitary elements" in the Constitution.

18. "133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or

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issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those languages."

19. See note 14, *supra*.
20. "94. Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in Those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof."
21. The Supreme Court Act, R.S.C. 1952, c.259, s.6, merely provides that at least three of the judges shall be appointed from superior court judges or advocates in the Province of Quebec. The Exchequer Court Act, R.S.C. 1952, c.98, does not make provision for minimum representation from the Province of Quebec.
22. In John Deere Plow Company, Limited v. Wharton, [1915] A.C. 330 at 338, Viscount Haldane said, with reference to sections 91 and 92 of the B.N.A. Act:

"The language of these sections and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme. The draftsman had to work on the terms of a political agreement, terms which were mainly to be sought for in the resolutions passed at Quebec in October 1864. To these resolutions and the sections founded on them the remark applies which was made by this Board about the Australian Commonwealth Act in a recent case (Attorney-General for the Commonwealth v. Colonial Sugar Refining Co.), that if there is at points obscurity in language, this may be taken to be due, not to uncertainty about general principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages. It may be added that the form in which provisions in terms over-lapping each other have been placed side by side shows that those who passed the Confederation Act intended to leave the working out and interpretation of these provisions to practice and judicial decision."

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See also Rand J. in Switzman v. Elbling and A-G of Quebec, [1957] S.C.R. 285 at 303:

"The heads of ss. 91 and 92 are to be read and interpreted with each other and with the provisions of the statute as a whole; and what is then exhibited is a pattern of limitations, curtailments and modifications of legislative scope within a texture of interwoven and interacting powers."

23. In Reference re The Farm Products Marketing Act, [1957] S.C.R. 198 at pp. 212-213, Rand J. said:

"The powers of this Court in the exercise of its jurisdiction are no less in scope than those formerly exercised in relation to Canada by the Judicial Committee. From time to time the Committee has modified the language used by it in the attribution of legislation to the various heads of ss. 91 and 92, and in its general interpretative formulations, and that incident of judicial power must, now, in the same manner and with the same authority, wherever deemed necessary, be exercised in revising or restating those formulations that have come down to us. This is a function inseparable from constitutional decision. It involves no departure from the basic principles of jurisdictional distribution; it is rather a refinement of interpretation in application to the particularized and evolving features and aspects of matters which the intensive and extensive expansion of the life of the country inevitably presents."

24. A-G Canada v. A-G Ontario, [1937] A.C. 326 at p.352.

25. There is in the judgment of the Supreme Court of Canada in the Labour Conventions case, [1936] S.C.R. 461 at pp. 509-513, an interesting passage in the opinion of Rinfret J. (as he then was) concerning the exercise of the federal executive power to make treaties where the legislation required to implement the obligations to be incurred thereunder would necessarily trench upon areas of provincial legislative jurisdiction. His opinion that federal legislative ratification can only be valid in such circumstances if it is preceded by the consent of the provinces suggests a theory of the federal power to make and ratify treaties, which, while not affirmed by a decision of either the Privy Council or the Supreme Court, nevertheless emphasizes a practical aspect of working or co-operative federalism which deserves reconsideration today. His opinion was, of course, based on the assumption, derived from an interpretation of the Privy Council's decisions in the Aeronautics and Radio References, that federal legislative power to implement treaties outside the scope of s.132 of the B.N.A. Act was a plenary one. Since this view of

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federal power was rejected by the Privy Council in the Labour Conventions case, the concern of Rinfret J. with the necessity of provincial consent, where provincial areas of legislative jurisdiction would be involved, is no longer of practical constitutional importance, but it serves as an interesting point of departure for a re-examination of federal and provincial relations under the Constitution with respect to foreign affairs.

26. See W. R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" in The Courts and the Canadian Constitution, (Toronto: McClelland and Stewart Limited, 1964 [The Carleton Library No. 16]), p.200; Bora Laskin "Occupying the Field: Paramountcy in Penal Legislation", (1963) Can. Bar Rev. 234.
27. The classic statement of the aspect doctrine is found in Hodge v. The Queen, (1883), 9 App. Cas. 117: "... subjects which in one aspect and for one purpose fall within s.92, may in another aspect and for another purpose fall within s.91." In A-G Can. v. A-G. B.C. (Fish Canneries case), [1930] A.C. 111 at p.118 as follows: "There can be a domain in which Provincial and Dominion legislation may overlap, etc."
28. Provincial Secretary of P.E.I. v. Egan and A-G of P.E.I., [1941] S.C.R. 396. Reference Re Section 92 (4) of The Vehicles Act, 1957 (Sask.), c.93, [1958] S.C.R. 608. The Queen v. Yolles, (1959) 19 D.L.R. (2d) 19. O'Grady v. Sparling, [1960] S.C.R. 804. Smith v. The Queen, [1960] S.C.R. 776. Mann v. The Queen, judgment of the Supreme Court of Canada on January 25, 1966, as yet unreported. The effect of these decisions will be given further consideration in Chapter V.
29. A-G Nova Scotia v. A-G Can., [1951] S.C.R. 31.
30. P.E.I. Potato Marketing Board v. H. B. Willis Inc. and A-G Can., [1952] 2 S.C.R. 392.
31. Re Gray, (1918) 42 D.L.R. 1; 57 S.C.R. 150. Reference re Regulations (Chemicals) under War Measures Act, [1943] S.C.R. 1.
32. The term "conditional" is applied, in Canadian constitutional analysis, to legislation the operation of which is made to depend upon the existence or non-existence of facts, circumstances, or legislative acts within the competence or control of another legislature. A good example of conditional legislation is s.6 of the federal Lord's Day Act, R.S.C. 1952, c.171, which makes the operation of a federal criminal law prohibition against Sunday activity conditional upon the non-existence of provincial

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legislation permitting such activity. The validity of this provision was considered and affirmed by the Supreme Court of Canada in Lord's Day Alliance of Canada v. A-G B.C., [1959] S.C.R. 497, as not being a delegation by Parliament of its legislative jurisdiction with respect to criminal law but merely a limitation imposed by Parliament upon the operation or effect of a criminal law provision. Either Parliament or any one of the provincial legislatures may validly adopt or incorporate by reference into its own legislation legislative provisions enacted by the other. This may be validly done with respect to future as well as present enactments of the other legislature. The essential condition for validity is that both the legislation which adopts and that which is adopted should be within the legislative competence of the respective legislatures which enacted them. In effect, the adoption or legislation by reference must not so change the purpose or object and effect of the legislation as to make it ultra vires. What is necessarily adopted is the form or legislative technique rather than the purpose or object, or more precisely, the aspect of the other legislation. The adoption of existing legislative provisions does not raise any particular question so long as it is legislation which the adopting legislature could validly enact, but the adoption of future legislative provisions does appear, at first blush, to be a surrender of legislative initiative to another legislature. Some doubt as to the validity of such "anticipatory incorporation by reference" is to be found in the case law, but on this issue Laskin, Canadian Constitutional Law, 2nd ed., 1960, p.37, expresses the opinion that there is no objection to a borrowing by one legislature of future enactments by another so long as both legislatures are acting within their respective spheres of jurisdiction. It would appear, however, that it is necessary to distinguish between adoption and abdication. A-G Ont. v. Scott, [1956] S.C.R. 137 per Rand J. at pp. 142-143.

33. See, for example, the Report of the Royal Commission of Inquiry on Constitutional Problems (Tremblay Commission), Quebec, 1956, Vol. III, Book I, pp. 288 ff.; Morin, "A Constitutional Court for Canada", (1965), 43 Can. Bar Rev. 545. The status of the Supreme Court of Canada with particular reference to the problem before this Commission, will be given more detailed consideration in a subsequent chapter.
34. Russell v. The Queen, (1882) 7 App. Cas. 829.
35. The subsequent judicial treatment of the Peace, Order and Good Government power is trenchantly reviewed by Laskin in " 'Peace Order and Good Government' Re-examined", (1947), 25 Can. Bar

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Rev. 1054. There is a general disposition to consider or hope that the "emergency" approach to the POGG power was destroyed by the decisions of the Privy Council in A-G Ont. v. Canada Temperance Federation, [1946] 2 D.L.R. 1 and the Supreme Court of Canada in Johannesson v. The Rural Municipality of West St. Paul, [1952] 1 S.C.R. 292 but the special character of the problems in those cases -- temperance and aeronautics -- makes it difficult to generalize about their future significance, particularly in view of the re-affirmation by the Privy Council, subsequent to the judgment in the Canada Temperance Federation case, of the approach laid down in its earlier decisions: Co-operative Committee on Japanese Canadians et al v. A-G Canada, [1947] A.C. 87; C.P.R. v. A-G B.C., [1950] A.C. 122; Reference as to the Validity of Section 5 (a) of the Dairy Industry Act, [1951] A.C. 179; [1949] S.C.R. 1.

36. Laskin, " 'Peace, Order and Good Government' Re-Examined", (1947), 25 Can. Bar Rev. 1054.
37. Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada", in The Future of Canadian Federalism, edited by P-A. Crépeau and C. B. Macpherson (University of Toronto Press: 1965), p.109.
38. For discussion of the rule against reference to Parliamentary speeches and other extrinsic aids in the interpretation of statutes, see Corry, "The Use of Legislative History in the Interpretation of Statutes", (1954), 32 Can. Bar Rev. 624; Kilgour, "The Rule against the Use of Legislative History: 'Canon of Construction or Counsel of Caution!?' ", (1952) 30 Can. Bar Rev. 769. On the whole, courts have tended to follow this rule in Canadian constitutional cases, although it has been affirmed from time to time that examination of legislative history and other facts may be desirable, if not necessary, in determining pith and substance, particularly where the issue is whether the legislation is colourable. See, for example, Taschereau J. (as he then was) in Lower Mainland Dairy Products Board v. Turner's Dairy Ltd., [1941] S.C.R. 573, at p.583.
39. Lederman, Review of O'Hearn's Peace, Order and Good Government, (1965), 43 Can. Bar Rev. 669, at p.674.
40. Morin, op. cit. at p.551.
41. See, for example, Reference re Waters and Water-Powers, [1929] S.C.R. 200, at p.216.

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42. See, for example, Montreal Street Rly. Co. v. City of Montreal, (1910) 43 S.C.R. 197, at pp. 227 ff.; Reference re Hours of Labour, [1925] S.C.R. 505, at p.511.
43. See, for example, The King v. Eastern Terminal Elevator Co., [1925] S.C.R. 434, at p.448.
44. Reference re Validity of Section 5 (a) of the Dairy Industry Act, [1949] S.C.R. 1, at p.50.
45. In addition to the decisions in note 28 above which have effectively liberated provincial regulatory jurisdiction from inhibition by the federal criminal law power, outstanding examples of the new emphasis on provincial jurisdiction over "property and civil rights" in virtue of s.92 (13) of the B.N.A. Act are the decision in A-G Ontario v. Barfried Enterprises Ltd., [1963] S.C.R. 570 which maintained the validity of the Ontario Unconscionable Transactions Relief Act notwithstanding the argument which could be made against it on the basis of federal jurisdiction in relation to interest; and the decision in Oil, Chemical and Atomic Workers International Union, Local 16-601 v. Imperial Oil Ltd. and A-G B.C., [1963] S.C.R. 584 which affirmed the validity of provincial legislation prohibiting a trade union from using membership dues for political purposes notwithstanding the argument that it constituted an interference with the freedom of speech and expression held in previous cases to be an essential basis of the federal parliamentary system and therefore beyond the reach of provincial law.
46. One may well ask whether this trend has not been influenced in some measure by what was said by the Honourable Vincent C. MacDonald in his Osgoode Hall lecture in 1960 entitled "Legislative Power and the Supreme Court in the Fifties" published in The Courts and the Canadian Constitution, W. R. Lederman, op. cit., p.152 at p. 170: "In any event the Court might well exemplify the policy of the Privy Council, early avowed and often restated, that in passing on questions of validity involving the B.N.A. Act "it will be a wise course ... to decide each case which arises ... without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand" (Citizens Insurance Co. of Canada v. Parsons. Queen Insurance Co. v. Parsons (1881), 7 A.C. 96, at p.109) "the object as far as possible [being] to prevent too rigid declarations of the Courts from interfering with such elasticity as is given in the written constitution" (The Combines Investigation Act Case (Proprietary Articles Trade Assoch. v. A-G for Canada, [1931] A.C. 310, at p.317)). The Privy Council often disregarded these cautionary precepts to the detriment of

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that orderly elucidation of the law which results from gradual clarification of terms, as new cases present new aspects of meaning, rather than from great advances marked by subsequent retreats or enervating "explanations". "

47. It has generally been assumed that s.99 of the B.N.A. Act which contains a constitutional guarantee of tenure during good behaviour (subject to compulsory retirement at age 75) for judges of the "Superior Courts" does not apply to judges of the Supreme and Exchequer Courts of Canada although Lederman in "The Independence of the Judiciary", (1956); 34 Can. Bar Rev. 1139 at pp. 1175-1176, expresses a contrary view.

CHAPTER III.

1. The opinion of Duff C.J. in the Alberta Press case [1938] S.C.R. 100 does remind us, however, that the words in the preamble of the Constitution may not be without significance as a source of inspiration for general principles of far-reaching consequence. In holding that the provincial legislation in that case was an interference with the right of public discussion essential to the operation of the federal parliamentary system, he observed: "The preamble of the statute, moreover, shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom." Abbott J. went even further in the Padlock Act case, [1957] S.C.R. 285, where he found in the words "a Constitution similar in Principle to that of the United Kingdom" justification for the opinion, albeit obiter, that "Parliament itself could not abrogate this right of discussion and debate."
2. See Chapter II, note 18.
3. See Chapter II, note 14.
4. Despite the limited extent to which the right to the use of the English language in the Province of Quebec is guaranteed by s.133 of the B.N.A. Act, I assume that the Courts would presently find implied in this constitutional recognition of its official character in Quebec as well as in Parliament and the federal Courts and in the constitutional guarantee of free speech which has evolved from the Alberta Press case an effective limitation upon the power of the provincial legislature to legislate so as to restrict or penalize the use of the English language in various spheres of activity in the Province. Certainly there

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can be no doubt that the province cannot validly abolish the official character of the English language in Quebec. Although the Manitoba Act of 1890 constitutes an unfortunate political precedent for such action, it is difficult to see how it is a constitutionally valid one. See F. R. Scott, Civil Liberties and Canadian Federalism (University of Toronto Press: 1959), p. 32.

5. Cf. General Motors Acceptance Corporation of Canada Ltd. v. Perozni, 51 D.L.R. (2d) 724, in which it was held that French is a "permissive" language in Alberta and that a conditional sale contract was validly registered in that province although written entirely in French.
6. [1917] A.C. 62.
7. Ibid., p.69. It is on the basis of this distinction that there is no constitutionally guaranteed right to separate or denominational schools in New Brunswick, Nova Scotia, Prince Edward Island, and British Columbia. Cf. Clement, The Canadian Constitution, (3rd ed.), p.782. Section 22 of the Manitoba Act, 1870, differs from s.93 of the B.N.A. Act in guaranteeing denominational rights or privileges established by law or "practice" at the Union.
8. City of Winnipeg v. Barrett, [1892] A.C. 445, in which the Privy Council held that the right to denominational schools which the Roman Catholics had in Manitoba as a matter of practice at the Union did not include the right to be exempt from taxation for the support of public schools. See also Roman Catholic Separate School Trustees for Tiny v. The King, [1928] A.C. 363, the effect of which was to limit the Roman Catholic right to tax-supported separate schools to those giving elementary education.
9. The position in Alberta and Saskatchewan, as established by the Alberta and Saskatchewan Acts of 1905, is that the right to separate schools is that which was provided by the ordinances of the North-West Territories of 1901, which gave to Protestant and Catholic minorities the right to support separate schools by their own taxation without liability for the support of other schools.
10. There is no apparent reason why the rights to tax-supported denominational schools should be less in Saskatchewan than in Alberta but the 1907 statute which purported to abolish this right in Saskatchewan, in so far as secondary schools are concerned, was never challenged. In the North-West Territories

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and the Yukon Territory there is essentially the same right to tax-supported denominational schools for both elementary and secondary education as there is in Alberta.

CHAPTER IV.

1. Dicey, The Law of the Constitution, 10th ed., 1959.
2. Jackson, The Supreme Court in the American System of Government, 1955, pp. 81-82, quoted by Edward McWhinney "The Supreme Court and the Bill of Rights -- The Lessons of Comparative Jurisprudence" (1959), 37 Can. Bar Rev. 16 at p.19. Cf. J. T. Thorson, "A New Concept of the Rule of Law", (1960), 38 Can. Bar Rev. 238, indicating the modern demand for a Rule of Law based on a constitutional guarantee of fundamental rights and freedoms rather than reliance on judicial application of common law concepts and rules of interpretation. See also F. R. Scott, op. cit., at p.13, to the effect that the English system for the protection of human rights "depends upon basic assumptions on which we cannot wholly rely in Canada".
3. Quoted by Gaius Ezejiofor, Protection of Human Rights under the Law, (London: Butterworths 1964) p.156.
4. Boucher v. The King, [1951] S.C.R. 265.
5. Ibid., pp. 285-286.
6. Ibid., p. 288.
7. Switzman v. Elbling and A-G for Quebec, [1957] S.C.R. 285.
8. Ibid., p.328.
9. Ibid., pp.306-307.
10. Ibid., pp. 327-328.
11. [1938] S.C.R. 100.
12. Ibid., pp. 132-135.
13. Saumur v. City of Quebec, [1953] 2 S.C.R. 299.
14. [1955] S.C.R. 834.

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15. [1959] S.C.R. 321.
16. (1957) Que. Q.B. 707.
17. Ibid., pp. 721-722. See also Pratte J. at p. 716 to the same effect. For comment on this decision see F. R. Scott, (1958), 36 Can. Bar Rev. 248.
18. See for example Alliance des Professeurs Catholiques de Montréal v. La Commission des Relations Ouvrières de Québec, [1953] 2 S.C.R. 140.
19. 8-9 Elizabeth II, c.44.
20. Strictly speaking, it also purports to apply to any pre-Confederation legislation, in force in a province by virtue of s. 129 of the B.N.A. Act, in relation to a matter which now falls under federal jurisdiction but such application is not likely to arise very often in practice. For a thorough analysis of the nature of the Canadian Bill of Rights see the series of articles published in (1959), 37 Can. Bar Rev. pp. 1 et seq., after the Bill was introduced in the House of Commons. For an earlier but very comprehensive and thought-provoking treatment of federal legislative jurisdiction in relation to this subject, see F. R. Scott, "Dominion Jurisdiction Over Human Rights and Fundamental Freedoms", (1949), 28 Can. Bar Rev. 497, and for an analysis of provincial jurisdiction in this field see Jacques-Yvan Morin, "Une Charte des Droits de l'Homme pour le Québec", (1963) 9 McGill L.J. 273.
21. For a review of the cases in the first few years since the enactment of the Canadian Bill of Rights which established the basic judicial attitude towards it, see Ezejiofor, op. cit., pp. 175-177; D. A. Schmeiser, Civil Liberties in Canada (Oxford University Press: 1964) pp. 36-53.
22. Section 2.
23. [1963] S.C.R. 651.
24. Note 13 supra. Another important Supreme Court decision relating to freedom of religion is Birks v. City of Montreal, [1955] S.C.R. 799 which held provincial legislation authorizing municipal councils to pass by-laws for the closing of stores on religious feast days to be ultra vires.
25. [1963] S.C.R. 651 at p.660.
26. 32 D.L.R. (2d) 290.

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27. [1963] S.C.R. 651 at p.662.
28. The Bill of Rights has been given some application in the definition and protection of the rights of accused persons under the criminal law. See for example Sommerville's Prohibition Application, 133 C.C.C. 323; R. v. Gray, 132 C.C.C. 337; and Shumiatcher v. A-G for Sask., 39 W.W.R. 577.
29. Albert S. Abel "The Bill of Rights in the United States: What Has It Accomplished?" (1959), 37 Can. Bar Rev. 147 at pp. 184 et seq.
30. It may be that the argument in favour of an entrenched Bill of Rights based on the existence of two cultures "with different concepts of the relationship of the individual and the charge to the state" does not have the same force in the sixties as it did in the fifties. Cf. F. R. Scott, Civil Liberties and Canadian Federalism, op. cit., p.14, and Ezejiofor, op. cit., p.164. For a detailed argument against the adoption of an entrenched Bill of Rights because of the power of judicial review which it gives, see D. A. Schmeiser, op. cit., pp. 22 et seq. Cf. comment thereon by D. A. Gibson, (1965), 43 Can. Bar Rev. 385.
31. Canadian Courts have refused, on the whole, to declare racial discrimination to be illegal on the ground of public policy or "public order and good morals". See Lowes Montreal Theatre v. Reynolds, (1919) Que. K.B. 459 (refusal to admit a negro to a theatre); Christie v. York Corporation, [1940] S.C.R. 139 (refusal to admit a negro to a tavern). In Noble & Wolfe v. Alley, [1951] S.C.R. 64 the Supreme Court was able to avoid the issue by declaring a restrictive covenant of a racial character void for uncertainty. But cf. In re Drummond Wren, [1945] 4 D.L.R. 674, holding such covenants to be illegal on the ground that provincial public policy must reflect international charters and agreements concerning human rights. In a similar vein, see F. R. Scott, "The Bill of Rights and Quebec Law" (1959), 37 Can. Bar Rev. 135 at pp. 143 et seq. for an interesting discussion of the possibility that, with the standard of public policy concerning discrimination now established in the Canadian Bill of Rights, the Quebec Courts are free to deal with this problem on the basis of public order and good morals.
32. For example: Conveyancing and Law of Property Act, R.S.O. 1960, c.66, s.22; An Act to Protect Certain Civil Rights (Bill of Rights Act), Stat. of Sask., 1947, c.35, 1953 R.S.S., c.345; An Act respecting Fair Accommodation Practices, Stat. of Sask., 1956, c.68; An Act to Prevent Discrimination in regard to Employment and in regard to Membership in Trade Unions, by reason of Race, Religion, Religious Creed, Colour or Ethnic or National Origin, Stat. of Sask., 1956, c.69; Law of Property Act, R.S.M. 1954, c.138; Employment

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Discrimination Act, R.S.Q. 1964, c.142, under which the Quebec Minimum Wage Commission has the duty of investigating complaints and attempting to effect settlement. See also federal Fair Employment Practices Act, Stat. of Can. 1953, c.19. The Ontario legislation respecting discrimination is now found in the Ontario Human Rights Code 1961-62, enacted by Stats. of Ont. 1961-62, c.93.

33. This would appear to be the general function contemplated for the Ontario Human Rights Commission.
34. The outstanding example in recent history of the protection afforded to civil liberties by the civil law action in damages is the judgment of the Supreme Court of Canada in Roncarelli v. Duplessis, [1959] S.C.R. 121, which condemned the Premier of the Province of Quebec, in his personal capacity, for having illegally ordered the cancellation of a liquor license for a cause extraneous to the law.

CHAPTER V.

1. The Parliament of Canada has exclusive legislative authority in relation to all matters coming within the class of subjects described in head 27 of s. 91 as "the Criminal Law, except the constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters".
2. Board of Commerce case, [1922] 1 A.C. 191.
3. P.A.T.A. v. A-G Can., [1931] A.C. 310; Lord's Day Alliance of Canada v. A-G for B.C., [1959] S.C.R. 497 at pp. 508-509.
4. Reciprocal Insurance case, [1924] A.C. 328 at p.342; A-G for B.C. v. A-G for Can., [1937] A.C. 368 at pp.375-376.
5. Margarine case (Reference as to the Validity of Section 5 (a) of the Dairy Industry Act) [1949] S.C.R. 1 at pp. 49-51.
6. Provincial Secretary of P.E.I. v. Egan, [1941] S.C.R. 396.
7. Cf. Russell v. The Queen, (1882) 7 App. Cas. 829, which upheld the validity of the Canada Temperance Act on the basis of the peace, order and good government clause, and Hodge v. The Queen, which affirmed the validity of provincial legislation to regulate the liquor traffic within a province, not as an aspect of public morality, but as a matter of municipal or police regulation of a merely local or private nature in the province.

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8. This issue is reflected in the Slot Machine decisions (to be commented on in greater detail in the text), in which the Supreme Court of Canada, on a four to three division, held provincial legislation providing for the confiscation of gambling machines to be ultra vires the provincial legislature: Johnson v. A-G Alberta, [1954] S.C.R. 127; DeWare v. The Queen, [1954] S.C.R. 182.
9. This issue is reflected in the case of A-G of Ontario v. Koynok, [1941] 1 D.L.R. 548, in which provisions in the Judicature Act of Ontario for an injunction to restrain the publication of a magazine found to be "obscene, immoral, or otherwise injurious to public morals" were held to be beyond provincial jurisdiction as relating to a matter of criminal law.
10. The issue here is reflected in the relationship between the federal power to compel Sunday observance, as in the Lord's Day Act, 1952 R.S.C., c.171, and provincial jurisdiction to permit, but not to prohibit, Sunday activity. Lord's Day Alliance v. A-G Can., [1925] A.C. 384; Lord's Day Alliance v. A-G B.C., [1959] S.C.R. 497.
11. Cf. Rex v. Hayduk, [1938] 4 D.L.R. 762, in which an Ontario statute making it an offence to procure lodging for oneself and a woman falsely held out to be one's wife was held to be ultra vires.
12. R.S.C. 1952, c.30. This Act comes into force in a county or city only when called for by a referendum.
13. R.S.C. 1952, c.171, ss.4, 6, 7. The prohibitions in this Act are qualified by the words "except as provided in any provincial Act or law now or hereafter in force".
14. Judgment was undoubtedly affected, even in those who would normally lean to the side of civil liberties, by the extremely offensive character of the language of the Jehovah Witnesses. It is significant that in almost all the important cases arising out of their activity -- Boucher, Sauvage, Chaput, Roncarelli, Lamb -- the provincial Court of Appeal was over-ruled by the Supreme Court of Canada.
15. Local Prohibition case, [1896] A.C. 348 at p.370.
16. Switzman v. Elling and A-G for Quebec, [1957] S.C.R. 285 at pp. 305-306.
17. Ibid., p.324.
18. Note 1, supra, at p.839.

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19. [1949] S.C.R. 1 at p.50.
20. R.S.Q. 1964, c.50.
21. R.S.Q. 1964, c.55.
22. Section 22.
23. [1962] S.C.R. 681.
24. See note 13, Chapter IV.
25. See note 14, Chapter IV.
26. See note 34, Chapter IV.
27. [1962] S.C.R. 681 at p.699.
28. Ibid., p.700.
29. Ibid., p.706.
30. Ibid., p.708.
31. Ibid., p.709.
32. [1961] Q.B. 610 at pp.615-616.
33. [1923] S.C.R. 681.
34. [1954] S.C.R. 127.
35. Switzman v. Embling and A-G for Quebec, [1957] S.C.R. 285 at p.288.
36. See note 28, Chapter II. To the cases cited there should be added the decision in Stephens v. The Queen, [1960] S.C.R. 823.
37. [1941] S.C.R. 396.
38. [1960] S.C.R. 776.
39. [1932] A.C. 318.
40. [1960] S.C.R. 776 at p.800.
41. Lymburn v. Mayland, [1932] A.C. 318 at pp. 326-327.
42. Cf. Birks v. City of Montreal, [1955] S.C.R. 799; [1954] Que. Q.B. 679; [1952] Que. S.C. 380.

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CHAPTER VI.

1. Sections 102 et seq.

2. The pivotal sections are 117, 109, and 108 which read as follows:

"117. The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country."

"109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same."

"108. The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada."

3. A-G Can. v. A-G Ontario, Quebec, and Nova Scotia (first Fisheries case), [1898] A.C. 700 at pp. 709, 712-713.

4. A-G B.C. v. A-G Can., [1914] A.C. 153 at p.172; A-G Quebec v. Nipissing Central Ry. Co. and A-G Can., [1926] A.C. 715 at pp. 723-724.

5. See note 2, supra.

6. Nipissing Central Ry. case, note 4, supra.

7. Ontario Mining Company v. Seybold, [1903] A.C. 73.

8. Reference re Waters and Water-Powers, [1929] S.C.R. 200 and cases referred to therein, notably Seybold, supra, Nipissing Central Ry., supra, and City of Montreal v. Harbour Commissioners of Montreal, [1926] A.C. 299.

9. For example, the following statutes to be found in 1952 R.S.C.: National Parks Act, c.189; National Harbours Board Act, c.187; St. Lawrence Seaway Authority Act, c.242; Atomic Energy Control Act, c.21; Railway Act, c.234.

10. R.S.C. 1952, c.116.

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11. "92. (10) Local Works and Undertakings other than such as are of the follow Classes:--
 - (a) Lines of Steam and other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
 - (b) Lines of Steam Ships between the Province and any British or Foreign Country:
 - (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces. "
12. "91. (29) Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces. "
13. See Luscar Collieries Limited v. McDonald, [1925] S.C.R. 460, and Laskin, Canadian Constitutional Law, 2nd ed. (1960), p.498.
14. Reference re Waters and Water-Powers, [1929] S.C.R. 200 at p.220.
15. See note 13, supra.
16. Luscar Collieries, note 13, supra.
17. Water-Powers Reference, note 14, supra.
18. It has been held that federal jurisdiction with respect to "navigation and shipping" must be "widely construed". City of Montreal v. Montreal Harbour Commissioners, [1926] A.C. 299 at p.312.
19. Navigable Waters Protection Act, R.S.C. 1952, c.193. An interesting example in recent years of the inter-governmental co-operation that is so often necessary in Canada for the development of natural resources is the agreement governing the development of water power on the Ottawa River involving the intervention of the Quebec, Ontario and federal governments. See 1942 Stats. of Que., c.33, and 1943 Stats. of Ont., c.21, and the Upper Ottawa Improvement Company et al v. The Hydro-Electric Power Commission of Ontario, [1961] S.C.R. 486, which arose out of the effect of this development on the driving operations of pulp and paper companies.
20. Forest Resources Utilization Act, 1964 R.S.Q., c.93. Although this Act does not explicitly prohibit exportation of un-processed wood it has this effect since it makes it a condition of a forest

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concession that all wood "be completely processed in Quebec". The Agricultural Marketing Act, 1964 R.S.Q., c.120, which applies to forest products, provides for the establishment of joint marketing plans and the negotiation of minimum selling prices to be paid to producers. In effect, it provides for a kind of collective bargaining by pulpwood producers, who would otherwise have to bargain individually with the pulp and paper companies. The Farmers' and Settlers' Pulpwood Sales Price Act, 1964 R.S.Q., c.94, empowers the government, where there is not a joint marketing plan for the sale of pulpwood under the Agricultural Marketing Act, to fix the kinds and quantities of pulpwood that a "trader shall purchase within a stated period, having regard to the supplies required for the normal operation of his business during such period" and "to fix the price that a trader who purchases such pulpwood must pay".

21. "95. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from time to time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada."
22. Section 91 (12) -- "Sea Coast and Inland Fisheries".
23. Laskin, Canadian Constitutional Law, 2nd ed. (1960), p.354: "Among the least illuminated areas of constitutional adjudication is that concerned with the scope of the concurrent power in relation to agriculture, given by s.95 of the B.N.A. Act. Here, as much as, if not more than anywhere else in the Act, was an invitation to a working federalism by which problems in the field, if not adequately serviced by provincial legislation, could be taken up or solved through national legislative policies. The possibilities represented by s.95 have, so far, foundered on a construction of the agricultural power which has drained it of substance, both as a source of provincial legislation and of federal legislation."
24. Canada Year Book 1965, pp. 625-637.
25. A-G B.C. v. A-G Can., [1914] A.C. 153 at p.174.
26. A-G Can. v. A-G Quebec, (1921) 1 A.C. 413 at p.431.

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CHAPTER VII.

1. John Deere Plow Company, Limited v. Wharton, [1915] A.C. 330 at p.340.
2. Bonanza Creek Gold Mining Company Limited v. The King, (1916) 1 A.C. 566; The Companies Reference case, (1916) 1 A.C. 598.
3. John Deere Plow, supra; Great West Saddlery Co. v. The King, (1921) 2 A.C. 91.
4. Great West Saddlery, supra.
5. A-G Man. v. A-G Can., [1929] A.C. 260.
6. A-G Man. v. A-G Can., supra, at p.268.
7. [1932] A.C. 318.
8. A-G Ont. v. A-G Can. (Local Prohibition case), [1896] A.C. 348; Brewers' and Malsters' Association of Ontario v. A-G Ontario, [1897] A.C. 231; A-G Man. v. Manitoba License Holders' Association, [1902] A.C. 73.
9. 47 P.L.R. (2d) 633.
10. In re The Insurance Act of Canada, [1932] A.C. 41.

CHAPTER VIII.

1. Note 11, Chapter VII.
2. Note 12, Chapter VII.
3. [1895] A.C. 367.
4. Ibid., p.372.
5. Contrary to the injunction of Duff C.J. in Reference re The Natural Products Marketing Act, [1936] S.C.R. 398, at p.421: "In considering these decisions, it is important to read what is said in the light of the thing that was decided, and it is fundamental that the interpretation and application of sections 91 and 92 of the B.N.A. Act cannot be controlled by particular expressions used in a judgment torn from their context and given the broadest meaning of which the words are capable without any reference to that context or to the particular controversy to which the language was directed."

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6. Grand Trunk Ry. of Canada v. Attorney-General, [1907] A.C. 65. It may be observed, however, that in the Supreme Court judgment in this case (36 S.C.R. 136) some of the judges do invoke the concept of "management", taken in a broad sense, but their reasoning forms no ground of the judgment in the Privy Council.
7. Workmen's Compensation Board v. C.P.R., [1920] A.C. 184.
8. Reference re Hours of Labour, [1925] S.C.R. 505.
9. [1955] S.C.R. 529.
10. Ibid., p. 592.
11. Ibid., p. 578.
12. The Courts and the Canadian Constitution (The Carlton Library: 1964), p. 170. Mr. Justice MacDonald also refers, however, to the classic statement by Sir Frederick Pollock of the great problem of judicial statesmanship: "determining when it is wise to decide a matter on the narrowest possible base and when it is both legitimate and salutary to grasp the opportunity to formulate general principles in the hope that they may have an influence extending far beyond the immediate case."
13. It does not necessarily follow, however, that regulation of interprovincial works and undertakings is a matter which must always be left, from the point of view of administrative policy, to the federal government. Following the decision of the Privy Council in A-G Ont. v. Winner, [1954] A.C. 541 which held certain conditions imposed by the Motor Carrier Board of New Brunswick upon a licence granted to an interprovincial bus line to be ultra vires as an interference with an interprovincial work or undertaking within exclusive federal jurisdiction, the federal government, in the Motor Vehicle Transport Act, 1954 (Can.), c. 59, delegated administrative authority to the provinces to issue licences to interprovincial motor vehicle services and to fix the tolls for such interprovincial transportation. An issue has been raised as to the validity of this statute -- a matter of the utmost importance for the question of constitutional flexibility since it involves the distinction between the delegation of legislative power which is prohibited, under the Nova Scotia Interdelegation case (note 29, Chapter III) and the delegation of executive or administrative authority, permitted by the P.E.I. Potato Marketing Board case (note 30, Chapter III).

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CHAPTER IX.

1. Murphy v. C.P.R. and A.-G. Can., [1958] S.C.R. 626, where it was held that the prohibition in s.32 of the Canadian Wheat Board Act against interprovincial movement of grain without a licence from the Board is not in conflict with s.121 of the B.N.A. Act which provides: "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."
2. Regina v. Klassen, (1959) 20 D.L.R. (2d) 406 in which the Manitoba Court of Appeal held that the provisions of the Canadian Wheat Board Act regulating deliveries to local feed mills engaged in intra-provincial trade were valid as "necessarily incidental to the other provisions of the Act dealing with interprovincial and export trade in grain."
3. It is unnecessary here to trace the steps by which the federal trade and commerce power was so reduced by decisions of the Judicial Committee of the Privy Council as to exclude federal regulation of intra-provincial aspects of trade and commerce and to deny any importance to this head of jurisdiction as a basis for the regulation of certain matters, such as the insurance business, combinations in restraint of trade, and industrial disputes, which might have been considered to have assumed national proportions and significance in the commercial life of the country. The result of the decisions was summed up by Sir Lyman Duff in Reference re Natural Products Marketing, [1936] S.C.R. 398 at p.416 as follows: "It would appear to result from these decisions that the regulation of trade and commerce does not comprise, in the sense in which it is used in section 91, the regulation of particular trades or occupations or of a particular kind of business such as the insurance business in the provinces, or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense; while, on the other hand, it does embrace the regulation of external trade and the regulation of interprovincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers." The progress in favour of a restoration of federal power in this field marked in the case of Murphy v. C.P.R., *supra*, may be seen in a comparison of the decision in this case with that of the Supreme Court of Canada in The King v. Eastern Terminal Elevator Company, [1925] S.C.R. 434, in which a majority held that the provisions of the Canada Grain Act of 1912 for the regulation of grain elevators were ultra vires as an attempt to regulate a local business within the provinces contrary to the decisions of the Privy Council, and in particular, the Insurance Reference case [1916] 1 A.C. 588.

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4. Shreveport case, 234 U.S. 342. The importance of the federal commerce power in the United States -- declared by one judge of the Supreme Court to be "as broad as the economic needs of the nation" -- is in striking contrast to the judicial treatment of federal jurisdiction with respect to trade and commerce in Canada. For a thorough comparison of the commerce powers under the two constitutions, see Alexander Smith, The Commerce Power in Canada and the United States, (Toronto: Butterworths, 1963).
5. Rex J. in Reference re The Farm Products Marketing Act, R.S.O. 1950, Chapter 131, as amended, [1957] S.C.R. 198 at pp. 211-212.
6. Note 5, supra.
7. Ibid., p.214.
8. Cf. Board of Commerce case, [1922] 1 A.C. 191; Proprietary Articles Trade Association v. A-G Can., [1931] A.C. 310; and A-G B.C. v. A-G Can. (Reference re Section 498 A of the Criminal Code), [1937] A.C. 358.
9. See Standard Sausage Co. v. Lee, [1933] 4 D.L.R. 501 (Ont. C.A.) re the federal Food and Drug Act; and Rex v. Perfection Creameries Limited, [1939] 3 D.L.R. 185 (Man. C.A.) re the federal Dairy Industry Act, R.S.C. 1927, c.45. Presumably the Maple Products Industry Act, R.S.C. 1927, c.272, and the Fertilizers Act, Stat. of Can., 1927, c.37, rest on the same basis. Federal jurisdiction with respect to agriculture might be thought to be the logical basis for this legislation, but the agriculture power has been given such a narrow interpretation by the Courts on the basis of the distinction between legislative subject matter and consequential effects as apparently to exclude regulation of transactions which are not a direct and immediate part of the primitive processes of agriculture. See note 23, Chapter VI, supra; also Reference re Section 6 of the Saskatchewan Farm Security Act, [1947] S.C.R. 394, aff'd. sub. nom. A-G Sask. v. A-G Can., [1949] A.C. 111. Cf. also Mignault J. in The King v. Eastern Terminal Elevator Company, [1925] S.C.R. 434 at p. 456 for the distinction between legislation in relation to agriculture and legislation in relation to "a product of agriculture considered as an article of trade".
10. Section 343 of the Criminal Code of Canada makes it an offence to publish a false prospectus. The validity of provincial legislation regulating security transactions has been upheld on the basis of jurisdiction over property and civil rights (Lymburn v. Mayland, [1932] A.C. 318) but such regulation, to be operative against federally incorporated companies, must not wholly preclude such

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companies from selling their securities without a provincial licence (A-G Man. v. A-G Can., [1929] A.C. 260). So far, the penal provisions, enacted under the authority of section 92 (15) of the B.N.A. Act, for the enforcement of provincial securities legislation, has not been held to be inoperative by reason of conflict with the provisions of the Criminal Code relating to securities transactions (Smith v. The Queen, [1960] S.C.R. 776). As in the case of company law generally, the field of securities regulation is one in which there is a constant demand for an increasing measure of uniformity and elimination of administrative duplication. It will be recalled that it was precisely this desire for uniform legislative treatment that made the commercial interests at Confederation urge the assignment of jurisdiction to the Parliament of Canada over the more important matters of commercial law. Under the Securities Act of 1933, the Securities and Exchange Commission of the United States regulates the public offering of securities in interstate commerce or through the mails.

11. See The Goodyear Tire and Rubber Co. of Canada et al v. The Queen, [1956] S.C.R. 303, in which the Supreme Court of Canada held that the provision in section 31 of the Combines Act for a restraining order (what is called a "cease and desist order" in the United States) was valid under the federal criminal law power, but the question was left open as to the constitutional validity of the provision in the same section for an order directing the dissolution of a merger, trust or monopoly.
12. Reference as to the validity of Section 5 (a) of the Dairy Industry Act, [1949] S.C.R. 1, et seq. sub. nom. Canadian Federation of Agriculture v. A-G Que., [1951] A.C. 179.
13. The prohibition of the manufacture and sale of a particular product within the province would appear to be prima facie within provincial legislative jurisdiction, though on precisely what basis is not too clear. Cf. A-G Ont. v. A-G Can. (Local Prohibition case), [1896] A.C. 348, where in answer to the question, "Has a provincial legislature jurisdiction to prohibit the manufacture of such liquors within the province?", the Privy Council said: "In the absence of conflicting legislation by the Parliament of Canada, their Judgments are of the opinion that the provincial legislatures would have jurisdiction to that effect if it were shown that the manufacture was carried on under such circumstances and conditions as to make its prohibition a merely local matter in the province."

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14. While the federal Agricultural Products Marketing Act, R.S.C. 1952, c.6, authorizing delegation by the Governor in Council to a provincial agency of administrative authority to regulate the marketing of agricultural products in interprovincial and export trade was held to be valid in P.E.I. Potato Marketing Board v. H. B. Willis Inc., [1952] 2 S.C.R. 392, the difficulty arising from the fact that the federal and provincial statutes in such cases must be within the respective jurisdictions of Parliament and the provincial legislatures, having regard to the uncertain and to some extent overlapping spheres of jurisdiction in this field, is reflected in the following statement from the opinion of Kellock J. in this case: "In the result, while it is clearly within the competence of Parliament and a provincial legislature to authorize an agency such as the agency contemplated by the legislation here in question so as to bring about a regulation of the whole field of trade in a natural product, it is necessary that the Dominion and provincial legislation respectively be confined to the legislative jurisdiction of each legislature."
15. Under both the American and Australian Constitutions there would appear to be less inhibition upon federal legislative initiative in the field of trade and commerce while leaving considerable scope to state regulation in the absence of federal intervention. See Laskin, Canadian Constitutional Law, 2nd ed., 1960, pp.315-316. Under the American Constitution, Congress has power "to regulate Commerce with foreign Nations and among the several States . . .", and under the Australian Constitution the Commonwealth Parliament has jurisdiction with respect to "Trade and commerce with other countries, and among the States", but under both Constitutions the residue of legislative power rests with the states. Moreover, in neither Constitution is the federal commerce power explicitly exclusive of state jurisdiction. Under the American Constitution there has evolved a highly flexible and pragmatic approach which leaves a degree of concurrent jurisdiction, subject to a rule of paramountcy in favour of federal intervention. For a summary of the present judicial approach, see Smith, op. cit., pp.233-234. In the final analysis, however, it would appear that Congress is acknowledged to have the power to determine the effective distribution of legislative jurisdiction to regulate commerce. Under the Australian Constitution the doctrine of "incidental powers" gives the Commonwealth Parliament a legislative reach in respect of trade and commerce comparable to that enjoyed by the United States Congress under the Shreveport doctrine.

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16. Laskin, op. cit., pp. 653-654.
17. [1924] A.C. 999. The issue in this case was the validity of the federal Income War Tax Act, 1917, as applied to the income in the form of salary and sessional indemnity, of a provincial minister of the Crown. The Privy Council held that the Act was intra vires the Parliament of Canada and validly applied to the minister.
18. Ibid., pp. 380-381.
19. As to whether Parliament may impose indirect taxation for provincial purposes, see the doubt raised by Laskin, op. cit., p. 64.
20. [1936] S.C.R. 427 aff'd. sub. nom. A-G Can. v. A-G Ont., [1937] A.C. 355.
21. [1936] S.C.R. 427 at p. 432.
22. [1932] A.C. 41 at p. 52.
23. [1937] A.C. 355 at pp. 366-367.
24. Laskin, op. cit., pp. 658-659.
25. An example of this kind of problem is to be seen in the decision which held that provincial marketing schemes providing for equalization of returns were invalid as involving the imposition of indirect taxation. Lower Mainland Dairy Products v. Crystal Dairy Ltd., [1933] A.C. 168; Lower Mainland Dairy Products Board v. Turner's Dairy Ltd., [1941] S.C.R. 573. The problem would now appear to have been eliminated by the decision of the Supreme Court in Crawford and Hillside Farm Dairy Ltd., (1960), 22 D.L.R. 2d 321. For analysis of this problem and a question as to the validity of a federal delegation to a provincial agency of administrative power to impose indirect taxation for provincial purposes, see Laskin, op. cit., pp. 712-716.

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CHAPTER X.

1. "92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say,--
 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts. "
2. See Note 16, Chapter II.
3. Section 100 of the B.N.A. Act which reads: "100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia, and New Brunswick), and of the admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada."
4. "99. (1) Subject to subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.
(2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age."
5. "97. Until the laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.
"98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province."
6. Toronto Corporation v. York Corporation, [1938] A.C. 415 at pp. 425-426. See also O. Martineau & Sons Limited v. City of Montreal, [1932] A.C. 113 at pp. 120-121, where section 96, as supplemented by sections 99 and 100, was said "to lie at the root of the means adopted by the framers of the statute to secure the impartiality and the independence of the Provincial judiciary."

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7. [1938] S.C.R. 398 at pp. 415-416.
8. For example, the decision of the Privy Council in Labour Relations Board of Saskatchewan v. John East Iron Works Ltd., [1949] A.C. 134, which held that the jurisdiction of the Saskatchewan Labour Relations Board (and particularly that which permitted the Board to order the reinstatement of an employee who had been dismissed for union activity) did not make the Board a superior court or tribunal analogous thereto within the meaning of s.96 so as to require federal appointment of its members, might have been thought to have put an end to attacks upon the jurisdiction of Labour Relations Boards based on this section of the Constitution, but such attacks persist. See R. v. Ontario Labour Relations Board Ex parte Ontario Food Terminal Bd. and comment by Laskin, (1963), 41 Can. Bar Rev. 446; also Tremblay v. Quebec Labour Relations Board et al., [1956] Q.B. 44 (appeal pending in the Supreme Court of Canada) in which the issue is whether the power conferred by s.50 of the Quebec Labour Relations Act to decree the dissolution of an association for participation in an offence against s.20 of the Act is jurisdiction which may be exercised by a provincially appointed officer. The provincial Court of Appeal, in a three to two judgment, affirmed the validity of s.50, but the division in the Court underlines the continuing seriousness of s.96 as an embarrassment to provincial regulatory jurisdiction. It must be said that the decision of the Supreme Court of Canada on a five to four division, in the Olympia Bowling case, [1955] S.C.R. 454, holding that the Ontario Municipal Board did not have power to determine whether certain property was assessable, has created a great deal of uncertainty with respect to the bearing of s.96 of the B.N.A. Act upon the validity of the jurisdiction of provincial administrative authorities to determine questions of law. See Laskin, "Municipal Tax Assessment and Section 96 of the B.N.A. Act: The Olympia Bowling Alleys case", (1955), 33 Can. Bar Rev. 993. So far, provincial Workmen's Compensation Boards have survived attack based on section 96. Slanec v. Grimstead, 54 Que. K.B. 230, [1932] 3 D.L.R. 81; Farrell v. Workmen's Compensation Board, [1962] S.C.R. 48.
9. Revoi touchant la Constitutionnalité de la Loi concernant la juridiction de la Cour de Magistrat, [1965] S.C.R. 772, rev'd. [1965] Q.B. 1, 55 D.L.R. (2d) 516.
10. [1938] S.C.R. 398.
11. Attorney - General of British Columbia v. McKenzie, [1965] S.C.R. 490, 48 D.L.R. (2d) 447.

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12. By section 34 of the new ~~Code~~ of Civil Procedure (enacted by 1965 Stat. Que., c.80) the monetary limit of the jurisdiction of the Provincial Court has now been raised to \$1000.
13. For an interesting examination of the question of the security of judicial salaries under the Canadian Constitution, see Lederman "The Independence of the Judiciary", (1956) 34 Can. Bar Rev., 1139 at pp. 1163-1165.
14. Report of the Royal Commission of Inquiry on Constitutional Problems, 1956, especially Vol. III, Book 1, pp. 228 et seq.
15. Morin, "A Constitutional Court for Canada", (1965) 43 Can. Bar Rev. 545; also "Vers un nouvel équilibre constitutionnel" in The Future of Canadian Federalism (University of Toronto Press: 1965), at pp.153-154.
16. For a detailed summary of the law governing the judiciary of the Federal Republic of Germany, see Bowie and Friedrich, Studies in Federalism (Little, Brown & Co.: 1954) pp. 140 et seq. The result is a highly complicated system of judicature in the continental tradition and one which must be a fruitful source of jurisdictional conflict.
17. Vol. III, Book 1, p.295.
18. Cf. Bowie and Friedrich, op. cit., pp. 152-153, and McWhinney, Comparative Federalism, (University of Toronto Press: 1962) pp. 29-31. Both touch on the fact that only a certain proportion of the judges of the Federal Constitutional Court are appointed or elected for ~~life~~, the balance being elected for a limited term of years. The dilemma here would appear to be between creating the conditions of judicial independence and keeping the judges responsive to the changing constitutional and political outlook which they are supposed to represent.
19. In addition to what is said earlier in this Chapter, see pp. 50 et seq. in Chapter II.
20. This is on the assumption, of course, that these sections ~~do~~ not apply to the federal superior courts as is contended by Dean Lederman. See Chapter II, note 47.
21. Morin, "Vers un nouvel équilibre constitutionnel", supra, at pp. 148-153. In "A Constitutional Court for Canada" at pp. 551, Professor Morin makes the following suggestions concerning appointments: "The judges could be elected by the Senate, if the latter were transformed into a bi-national Upper House, and it could be

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provided that a two-thirds majority is required in order to obtain election (these suggestions could apply to the Common Law and Civil Law chambers of the Supreme Court as well). Should it be found that the creation of a Constitutional Court can be obtained before other, more far-reaching and pervasive changes advocated in the federal institutions (such as a new Senate), it could be provided that the French-speaking part of the Court would be nominated jointly by the federal and Quebec governments. "

22. For an excellent summary of the limitations of the reference case as a technique of constitutional determination, see MacDonald, "Legislative Power and the Supreme Court in the Fifties", in The Courts and the Canadian Constitution, (Toronto: McClelland and Stewart Limited, 1964 [The Carleton Library No. 16], pp. 171-172.



